No. 82-341

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NUECES COUNTY NAVIGATION DISTRICT NO. 1
Petitioner,

VS.

INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Interstate Commerce Commission err in vacating its previous orders condemning unduly prejudicial export grain rates to Corpus Christi, Texas, and prescribing non-prejudicial rates on that traffic by adopting a new test of what constitutes control of joint rates and a new policy of refusing to prescribe nondiscriminatory rates except in instances where such rates are also in violation of other provisions of the Interstate Commerce Act?

2. Can the Interstate Commerce Commission, by purporting to adopt a new test for what constitutes control of joint rates, actually make an interpretation of the Interstate Commerce Act which nullifies that Act's prohibition against unreasonable rate discrimination in situations where the origin carrier and the delivering carrier are unable, or unwilling, to agree on how to divide the revenues produced by the joint rates?

3. Did the Court of Appeals for the Fifth Circuit err (1) in holding the issues raised by three petitions for review of decisions by the Interstate Commerce Commission were moot and, (2) after so holding, dismissing those petitions rather than remanding the proceedings to the Interstate Commerce Commission with instructions to dismiss?

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IN THE

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OCTOBER TERM, 1982

No.

NUECES COUNTY NAVIGATION DISTRICT NO. 1
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Nueces County Navigation District No. 1, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in these proceedings which were there designated as Nos. 78-1348, 79-1816, 80-1842 and 80-1843, but decided on a consolidated basis.[1]

[1]In the Court of Appeals, Producers Grain Corporation was a petitioner but subsequently sold its grain elevator in Corpus Christi, Texas, and is not a petitioner here. The other parties in the court below were (a) the respondents, Interstate Commerce Commission and United States of America; (b) Bunge Corporation and Louis Dreyfus Corporation, intervenors in support of petitioners; and, (c) Missouri Pacific Railroad Company, Southern Pacific Transportation Company, The Atchison, Topeka and Santa Fe Railway Company, Burlington Northern, Inc., and Houston Port Bureau, Inc., intervenors in support of respondents.

OPINION BELOW

The opinion of the Court of Appeals is reported as *Nueces County Nav. Dist. No. 1 v. I.C.C.*, 674 F.2d 1055 (1982). A copy of the slip opinion is Appendix A.[2] Several decisions were issued by the Interstate Commerce Commission ("the Commission" or the "I.C.C.") in its Docket No. 36491 (Sub-No. 1). The first is reported as *Wheat, Oklahoma and Kansas to Texas Gulf Ports*, 357 I.C.C. 382 (1977). A copy of that decision is Appendix B. The second decision was styled the same, and is reported at 359 I.C.C. 592 (1979). A copy of that decision is Appendix C. The last was part of a consolidated decision in three cases. It is reported as *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 364 I.C.C. 269 (1980). A copy of that decision is Appendix D.

The other cases dealt with in the consolidated decision were the Commission's Docket Nos. 31098 and 33447. The previously entered orders in those dockets were vacated. Docket 31098 was decided as *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 291 I.C.C. 459 (1954). The order entered in that case is Appendix E. Docket 33447 was decided as *Nueces County Nav. Dist. No. 1 v. Atchison, T. & S. F. Ry. Co.*, 315 I.C.C. 155 (1961). The order entered in that case is Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1982. A petition for rehearing was denied June 1, 1982 (Appendix G). This petition for certiorari was timely filed within 90 days of that date, pursuant to Rule 20 of

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[2]The appendices are separately bound in a companion volume cited as "Pet. App.____".

this Court. The jurisdiction of the Court is invoked under Title 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Several sections of the Interstate Commerce Act (formerly 49 U.S.C. 1, et seq; now 49 U.S.C. 10101, et seq) are involved. While these proceedings were being considered by the I.C.C., Congress recodified the Act with no intention to change it. As the I.C.C. and the Court of Appeals have referred to sections of the Act as they read both prior and subsequent to the recodification, Appendix H reproduces certain sections as they formerly were, and now are. They were formerly designated as 49 U.S.C. 3(1), 49 U.S.C. 12(1)(a), and 49 U.S.C. 15(1), but are now 49 U.S.C. 10741(b), 49 U.S.C. 10321(a), and 49 U.S.C. 10704(a)(1), respectively.

STATEMENT OF FACTS

The origin of these proceedings dates back a number of years. In 1954, the I.C.C. issued its decision in Docket No. 31098, *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 291 I.C.C. 459 (1954). It held the export grain rates from points in ten midwestern states to Corpus Christi, Texas, were, and for the future would be, unduly prejudicial to Corpus Christi and unduly preferential to Galveston and Houston, Texas, "to the extent that the rates to Corpus Christi exceed those to Galveston and Houston" (291 I.C.C. 470).

The defendant railroads[3] had contended that they did

[3]The defendants in Docket 31098 were all of the railroads serving either (a) origin stations in the ten states, (b) Corpus Christi, or (c) the alleged preferred ports, including St. Louis-San Francisco Railway Company (Frisco), now merged into Burlington Northern, Inc.

not have "effective control" of the involved rates, but the Commission expressly held (291 I.C.C. 470):

> The *evidence clearly shows* that the Missouri Pacific Lines and the Texas & New Orleans[4], together with the other carriers which serve the Texas ports, acting in conjunction with the originating lines in this origin territory, *directly and effectively control the rates* to all such ports. (Emphasis supplied).

The order entered in Docket 31098 is Appendix E (Pet. App. 110a) By it the railroads were "required to establish, on or before April 29, 1954, . . . and thereafter to maintain and apply" rates to Corpus Christi that do not exceed the rates to Galveston and Houston.

In 1961, the I.C.C. issued its decision in its Docket 33447, *Nueces County Nav. Dist. No. 1 v. Atchison T. & S. F. Ry. Co.*, 315 I.C.C. 155 (1961). It held the export grain rates from points in Oklahoma, eastern New Mexico and northern Texas to Corpus Christi were, "and for the future will be, unduly prejudicial to Corpus Christi and unduly preferential of Galveston, Houston, and Port Arthur to the extent that the rates to Corpus Christi exceed the corresponding rates to Galveston, Houston, and Port Arthur". (315 I.C.C. 163).[5]

There, also, it was contended there was no basis for a finding of preference and prejudice because "no one carrier, or group of carriers, effectively controls the rates to

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[4]Texas & New Orleans was a wholly owned subsidiary of Southern Pacific Transportation Company which was later merged into the parent.

[5]Even though a large number of railroads, including the Frisco, were named as defendants, only three, not including the Frisco, tried to uphold the lawfulness of the assailed rates. (315 I.C.C. 156).

Corpus Christi and the other allegedly preferred ports", but the I.C.C. disagreed and held (315 I.C.C. 162):

> The Missouri Pacific and the Texas & New Orleans serve the Texas ports, including Corpus Christi, and those carriers and the other defendants, acting in conjunction with the originating lines, directly and effectively control the rates from Oklahoma, northern Texas, and eastern New Mexico to all of the considered ports.

The order entered in Docket 33447 is Appendix F (Pet. App. 112a). It required the railroads "to establish, on or before February 20, 1962, . . . and thereafter maintain rates . . , which will prevent and avoid the prejudice and preference found" in the report to exist.[6]

The railroads complied with the orders in Dockets 31098 and 33447 and established export grain rates to Corpus Christi at the identical level as the rates from the same origins to Galveston and Houston. Later efforts to "unequalize" those grain rates were condemned by the I.C.C.. *Export Grain From Texas to Texas Points,* 319 I.C.C. 16 (1963).

However, in 1970, a bare majority of the I.C.C. started trying to ignore the holdings and orders in Dockets 31098 and 33447 and allowing some railroads to reduce grain rates to Galveston and Houston without doing the same to

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[6]The holdings on control of rates and the orders in Dockets 31098 and 33447 were consistent with both earlier and later I.C.C. decisions relating to Corpus Christi and commodities other than grain. See *Nueces County Nav. Dist. v. Abilene & S. Ry. Co.*, 155 I.C.C. 712 (1929); *Nueces County Nav. Dist. No. 1 v. Abilene & S. Ry. Co.*, 253 I.C.C. 745 (1942); and, *Nueces County Nav. Dist. No. 1 v. Atchison T. & S. F. Ry. Co.*, 325 I.C.C. 400 (1965). The validity of the order in this last case was attacked, but upheld, in *City of Galveston v. United States*, 257 F. Supp. 243 (S.D. Tex. 1966); affirmed, per curiam, 386 U.S. 269 (1967).

Corpus Christi. Court review of each such action was sought, but with limited success.[7]

In 1977, the Frisco, as the origin line, published reduced grain rates from Oklahoma and Kansas points to Galveston and Houston but not to Corpus Christi. In response to protests, the I.C.C. instituted its Docket 36491 (Sub-No. 1) to investigate the lawfulness of that action. Disregarding the orders in Dockets 31098 and 33447, the I.C.C. allowed the unequalized rate structure to remain in effect by the decision which is Appendix B (Pet. App. 28a). Judicial review was sought.[8]

Thereupon, the Commission reopened Docket 36491 (Sub-no. 1) and issued the decision which is Appendix C (Pet. App. 66a). Judicial review of that order was sought. After petitioner's brief was filed in the Court of Appeals, the I.C.C. requested, and obtained, a remand of Docket

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[7]The first case conflicting with Dockets 31098 and 33447 was *Soybeans, Midwest to Chicago & Gulf Ports, Export*, 335 I.C.C. 883 (1970). That order was set aside in CA-3-4149-C, *Nueces County Navigation District, et al, v. United States of America*, not reported (N.D. Tex., 1973). On appeal, sub nom. *Chicago, Rock Island and Pacific Railroad Co. v. Nueces County Navigation District*, 416 U.S. 953 (1974), the judgment of the lower court was vacated and the case remanded with instruction to dismiss as moot. The second such case was *Corn and Soybeans, Midwest to Gulf Ports, For Export*, 349 I.C.C. 1 (1974). The suit attacking the validity of that order is pending in the District Court for the Northern District of Texas as CA-3-74-1253-D, and is being held in abeyance until these proceedings are concluded. Petitions for review of subsequent decisions were filed in the Fifth Circuit, but were dismissed as moot because, in each instance, the railroads extended the reduced rates to Corpus Christi after the filing for review. Hence, there is not a single court decision holding the Commission acted lawfully in disregarding its holdings and orders in Dockets 31098 and 33447.

[8]Review of I.C.C. orders is authorized by 28 U.S.C. 2321 and 28 U.S.C. 2341-2344. Jurisdiction of the Court of Appeals for the Fifth Circuit, in the four proceedings consolidated by it, was invoked under those sections.

36491 (Sub-No. 1) for further consideration. Recognizing the conflict between its decisions in Docket 36491 (Sub-No. 1) and its decisions and orders in Dockets 31098 and 33447, the I.C.C. also announced it was reopening the two earlier dockets. Purporting to be acting in a rulemaking capacity, the I.C.C. refused to receive any additional evidence or to consider the evidence introduced at the original hearings in those dockets. Instead, the I.C.C. announced it was adopting a new test, or standard, for "control" of rates; vacated its orders in Dockets 31098 and 33447; and reaffirmed its decision in Docket 36491 (Sub-No. 1). Judicial review of that consolidated decision which is Appendix D (Pet. App. 92a) was sought.

The Court of Appeals held the cases involving the three decisions in Docket 36491 (sub-No. 1) were moot and dismissed those petitions for review. The I.C.C.'s vacation orders in Dockets 31098 and 33447 were affirmed.

ARGUMENT

THE DECISION BELOW ON CARRIER RESPONSIBILITY FOR JOINT RATES CONFLICTS WITH DECISIONS OF THIS COURT.

Contrary to what the I.C.C. and the court below state, these proceedings do not merely involve the "adoption" by the Commission of a "new standard of common control". Instead, the I.C.C. has come up with a new and novel interpretation of the Interstate Commerce Act, insofar as the prohibition against unjust discrimination in rates is concerned. In so doing, it has said, in essence, a railroad is not responsible for discrimination in its joint-line rates if that carrier can show it made "an unsuccessful good faith effort to arrive at a division of revenue with the connecting carriers". 364 I.C.C. 275 (Pet. App. 102a).

Moreover, the I.C.C. has engrafted a restriction on its power and duty under the Act to remedy discrimination when no such restriction has been enacted by the Congress. Thus, it has asserted "a rate cannot be prescribed absent common control unless there is some other violation of the act.". 364 I.C.C. 277 (Pet. App. 106a). In other words, the I.C.C. is holding there is no relief available under the statute for discrimination, per se, unless there is "common control" as the I.C.C. defines it. The Commission recognizes its construction of the Act may differ from the construction this Court has given such Act, but defiantly announces "even if we have the authority, we will not prescribe a rate unless it is necesary to cure some other violation of the act". 364 I.C.C. 277. (Pet. App. 106a).

A. THE COMMON CONTROL CONCEPT

With attitudes such as these, it is small wonder the I.C.C. has transgressed virtually all the holdings of this Court on the force and effect of the Act. This Court has consistently stressed the purpose and the scope of the prohibition against discrimination. In *Houston E. & W. T. R. Co. v. United States,* 234 U.S. 342 (1914), after quoting the provisions of the statute, it was stated (234 U.S. 356):

> This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn . . . . It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, ...[9]

The statutory prohibition against discrimination makes no distinction between individual and joint rates. Hence, if there is any limitation on the I.C.C.'s power and duty to

[9]See also *Louisville & N.R. Co. v. United States,* 282 U.S. 740, 749-750 (1931) and *State of New York v. United States,* 331 U.S. 284, 296 (1947).

correct discrimination in connection with joint rates, it is because the Congress has no power over such rates.[10] Congress not only has that power, but has exercised it. Sic, a carrier has the same reponsibility for the lawfulness of its joint rates as it does for its individual rates.

The I.C.C. and the court below have fallen into error by taking out of context, or misapplying, this Court's language in earlier decisions. Both rely on an isolated statement in *Central R.R. Co. of New Jersey v. United States,* 257 U.S. 247, 259 (1921) that "participation in joint rates does not make connecting carriers partners" without giving consideration to what was involved in that case and, consequently, the context in which Justice Brandeis wrote that language. In fact, they were careful to quote only a portion of the next sentence which distorts the true meaning of the statement. That sentence with the omitted portion emphasized reads (257 U.S. 259):

> They can be held jointly and severely responsible for unjust discrimination only if each carrier has participited in some way in that which causes the unjust discrimination, *as where a lower joint rate is given to one locality than to another similarly situated.* (Emphasis supplied).

Earlier, Justice Brandeis had made it clear the discrimination claimed there was not in the joint rates, but the failure to permit the privilege of creosoting in transit.[11]

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[10]While the court below held the issues in connection with Docket 36491 (Sub-No. 1) were moot, all the facts mentioned about the nature of the rates related to the rates in that docket. All rates involved in that case were joint rates. The Court of Appeals, in note 1, stated the I.C.C. had said "that Frisco serves the preferred ports directly and can serve Corpus Christi indirectly by means of Southern Pacific and MoPac.". (Pet. App. 5a). The I.C.C. later corrected this error by saying (364 I.C.C. 278 n. 8) the "Frisco does not serve any of the allegedly preferred points directly.". (Pet. App. 108a).

[11]It was pointed out (257 U.S. 255) neither railroad serving the complainant plant "accords the creosoting in transit privilege at any point

It was stated the prejudice the I.C.C. had found "arises not from the existence of joint rates, but from conditions local to other railroads". (257 U.S. 258). Thus, the decision was not dealing with individual carrier responsibility when the discrimination is, or is alleged to be, in the joint rate itself.

Other cases in which Justice Brandeis delivered the opinion address that subject and make plain the limited scope of the quoted language from the *Central* case. In *Louisville & N.R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U.S. 217 (1925) a major contention was that in connection with joint rates "the liability of the connecting carriers is not joint and several". (269 U.S. 231). This view was rejected by first ruling (269 U.S. 232-233):

> It is true that participation in joint rates does not make connecting carriers partners and that each does not become liable like a partner for every tort of any of the others engaged in the common enterprise. *Central R.R. Co. v. United States*, 257 U.S. 247, 259, 42 S. Ct. 80, 66 L. Ed. 217. Each connecting carrier is liable only for its own act. But the establishment of a joint rate by the concurrence of connecting carriers is necessarily the act of each, because the establishment of the rate is done by their joint agreement.

Next, it was held very specifically (269 U.S. 234):

> The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier. Every carrier who participates in the in-

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on its line"; "privileges like creosoting in transit are treated as a matter local to the railroad on which the transit point is situated"; and, "although a joint through route, with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent, of, and without consulting, connecting carriers."

> fliction of this wrong is liable *in solido* like every other joint tort-feasor.[12]

In *Chicago, I. & L. Ry. Co. v. United States,* 270 U.S. 287 (1926) it was "argued that, as a matter of law, a carrier cannot be guilty of unjust discrimination unless it is able by its own act to remove the inequality". (270 U.S. 292). This was based on the fact that some of the railroads did not directly connect with the railroad alleged to be discriminated against. The contention was overruled as follows (270 U.S. 293):

> Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue, and the order may extend to every carrier who participates in inflicting the injury. (Citing cases.) There is nothing to the contrary in *Central R.R. Co. of N.J. v. United States,* 42 S. Ct. 80, 257 U.S. 247, 66 L. Ed. 217. The relief sought there was denied solely because the Central, although it participated in establishing the through route and joint rate, did not participate in the service which alone was alleged to constitute discrimination.[13]

In the above decision, *St. Louis-Southwestern Ry. Co. v. United States,* 245 U.S. 136 (1917) was cited and relied on. There the carriers contended that since their "rails do not reach Paducah, they cannot be guilty of discrimina-

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[12]In so ruling, this Court was in accord with the Commission's past practice for it was noted (269 U.S. 232) the Commission had consistently held "that carriers who by means of a joint through rate make excessive charges are liable jointly and severally for all damages sustained", and a note listed a number of such cases.

[13]In *United States v. Illinois Cent. R. Co.,* 263 U.S. 515, 520 (1924) it was also urged the Illinois Central could not be held responsible for discrimination because it could not "by its own act" cure the situation. That position was rejected.

tion against that city". (245 U.S. 144). This proposition was rejected by stating (245 U.S. 144):

> They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality, is not confined to those whose rails enter it.

The above cases firmly establish that any carrier party to a joint rate is responsible for the lawfulness of such rate, not because the two or more carriers forming the through route are "partners" nor because of any doctrine of "strict liability". Instead, each carrier is answerable for the lawfulness of the joint rate because that rate was established by it and its connections acting in concert. Congress has prohibited each and every railroad operating in interstate commerce from having either individual or joint rates which cause unjust discrimination. The I.C.C. is not empowered to excuse any carrier from that ban. Neither can it confer immunity by holding a carrier has no responsiblity for its joint rate, if it cannot persuade its connecting carrier to join in changing that rate. This is so, for this Court has clearly held that under the Act each carrier party to a joint rate is fully and legally responsible for the lawfulness of that joint rate.

Although the I.C.C. and the Court of Appeals cite *Texas & P. Ry. Co. v. United States,* 289 U.S. 627 (1933), that case does not warrant the action the I.C.C. has taken, much less require it. The principal holding in that case was that ports were not "localities" and, therefore, were not protected from discrimination by the Act. 289 U.S. 644.

While that holding effectively nullified the I.C.C. orders under attack there, Justice Roberts discussed other matters.

In discussing discrimination, the "classical case" of a "single carrier serving two points approximately equidistant from a common origin" and charging "unequal rates for the two hauls" was first mentioned. 289 U.S. 648. Then, it was stated (289 U.S. 648):

> The principle comprehends, as well, instances of joint rates where the same carriers participate in the rates to both points, and where the originating (or delivering) carriers are different, but the delivering (or originating) carriers are the same. (Footnotes omitted).

That is precisely the type situation in issue here. For example, in Docket 36491 (Sub-No. 1) the Frisco is the origin carrier on wheat shipped from Oklahoma and Kansas, regardless of whether the wheat is consigned to Corpus Christi, on the one hand, or Galveston and Houston, on the other hand. On shipments to Corpus Christi the delivering carrier is either the Missouri Pacific or Southern Pacific, while on shipments to Galveston or Houston the delivering carrier is either the Fort Worth & Denver or the Missouri-Kansas-Texas. 364 I.C.C. 278 (Pet. App. 108a). Hence, the origin carrier is the same, even though the delivering carriers are different. A similar situation exists in connection with the rates involved in Dockets 31098 and 33447, and in some instances even the delivering carrier could be the same because the Missouri Pacific and Southern Pacific serve Galveston and Houston, as well as Corpus Christi.

The language on which the I.C.C. relies is (289 U.S. 650):

> A carrier or group of carriers must be the common source of the discrimination — must effectively participate in both rates, if an order for

> correction of the disparity is to run against it or them. Where an order is made under section 3 an alternative must be afforded. (Footnote omitted).

It will be observed that nothing in that holding refers to a carrier, or a group of carriers, having "control" over the rates, much less "actual control". Instead, all that is required is for a carrier, or a group of carriers, to "effectively participate in both rates". It is obvious that when an origin carrier, for instance, like the Frisco, establishes a joint rate from one of its stations in Oklahoma or Kansas in connection with the Missouri Pacific to Corpus Christi, and another in connection with the Fort Worth & Denver to Galveston or Houston, there is effective participation by the Frisco in both rates.

In view of the last sentence of the language quoted next above, we point out that it was subject to a footnote reference, which states (289 U.S. 650 n. 39) that an alternative is not required in connection with an order issued pursuant to Section 15(1) of the Act. (Formerly 49 U.S.C. 15(1), now 49 U.S.C. 10704(a)(1)).

Regardless of the scope of the decision in *Texas & Pacific,* supra, a significant fact is that Congress was evidently not pleased with that decision. As pointed out in *State of New York v. United States,* 331 U.S. 284, 296 (1947), Congress amended then Section 3(1) of the Act so as to extend the ban against its discrimination to include a "port, port district, gateway, transit point". This amendment eliminated the basis for the principal matter decided in *Texas & Pacific.*

Shortly thereafter the I.C.C. had occasion to rule on the force and effect of that amendment in *Albany Port District Comm. v. Ahnapee & W. Ry. Co.,* 219 I.C.C. 151 (1936). In that case it was alleged, among other things, that the rates between the port of Albany and the interior on export and import traffic were unduly prejudicial to

Albany and unduly prejudicial to other north Atlantic ports. (219 I.C.C. 152). The defendant railroads argued they did not, and could not, "unduly prejudice the port of Albany, the traffic through that port, or shippers of such traffic, because no one carrier or group of carriers could remedy the situation under an alternative order issued under Section 3 of the act.". 219 I.C.C. 171. In so contending, the carriers relied on the holding in *Texas & Pacific,* supra, about "a carrier or group of carriers must be a common source of the discrimination". Although the I.C.C. now says that in the Albany case it "presumed" there was "common control", this is not correct. The facts were discussed and it was found there was "a group of carriers which is the common souce of the alleged discrimination and which effectively participate in both sets of rates." 219 I.C.C. 172. Moreover, the legislative history of the amendment which added ports and port districts to then Section 3(1) was studied and that history was stated to indicate "that the amendment was intended to cover situations such as the one here under consideration.". 219 I.C.C. 173.

The approach, or procedure, of the *Albany* case has been followed by the I.C.C. and upheld by the courts until these proceedings.[14] For instance, in Docket 31098, supra, it was held (291 I.C.C. 470):

> The evidence clearly shows that the Missouri Pacific Lines and the Texas & New Orleans, together with the other carriers which serve the Texas ports, acting in conjunction with the originating lines in the origin territory, directly and effectively control the rates to all such ports.

[14]Two examples are *Hillsborough County Port Authority v. Ahnapee & W. Ry. Co.*, 313 I.C.C. 691 (1961), aff. per curiam sub nom. *Alabama, T. & N. R. Co. v. United States,* 207 F. Supp. 638 (S.D. Ala. 1962) and, *Brazos River Harbor Nav. Dist. v. Abilene & S. Ry. Co.*, 319 I.C.C. 54 (1963); 322 I.C.C. 529 (1964) aff. sub nom. *Atchison, Topeka & Santa Fe Railway Co. v. United States,* 231 F. Supp. 422 (N.D. Ill. 1964).

It is, we submit, bordering on sophistry to assert that in that case the I.C.C. "presumed" common control existed. Patently if the "evidence clearly" showed the described carriers "directly and effectively" controlled the rates to the Texas ports, there was no presumption, but instead a clear finding of fact based on evidence. In fact, petitioner submits the I.C.C. rhetoric about "presumed control" and "actual control" and similar expressions is nothing but a smoke screen trying to obscure the fact the I.C.C. is reconstruing the Act so as to relieve a carrier from responsibility for a discriminatory joint rate.

In this connection, neither the I.C.C. nor the Court of Appeals gave proper weight to this Court's holdings in *State of New York v. United States,* 331 U.S. 284 (1947), and *Ayrshire Collieries Corporation v. United States,* 335 U.S. 573 (1948). In *New York* the attack was on an order of the I.C.C. which had condemned certain intraterritorial and interterritorial rates as being discriminatory. A principal contention by the carriers was that the holdings of *Texas & Pacific,* supra, about common source of discrimination precluded the I.C.C. from making the order. This Court found no merit to that contention and ruled (331 U.S. 342-343):

> If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to § 3(1) fell far short of its goal. We do not believe Congress left the Commission so impotent.

Earlier it had been pointed out (331 U.S. 296-297) that § 3(1) was amended in 1935 to include "port, port district, gateway, transit point" and in 1940 to include "region, district, territory". Thus, ports and port districts have exactly the same status as regions and territories. Ergo, if Congress empowered the I.C.C. to prevent discrimination

against regions and territories, even though the rates involved in the rate relationship are not controlled by the same carriers, then Congress has done the same for ports and port districts. As it is the obligation of the I.C.C. to enforce the Act (49 U.S.C. 12(1)(a), now codified as 49 U.S.C. 10321(a)), it is crystal clear the Commission is shirking its obligations when it says it will not strike down discriminatory rates unless it can find "actual control", as it defines it.

As *New York* refers to the I.C.C. acting under § 15(1) (49 U.S.C. 15(1), now condified as 49 U.S.C. 10704(a)(1)), we point out that both Dockets 31098 and 33447 arose from the filing of complaints and these were handled under § 15(1). The orders in those cases were issued under that section. To illustrate, observe the order in Docket 31098. Appendix E. (Pet. App. 110a). It (a) found the rates to Corpus Christi unduly prejudicial to Corpus Christi, and unduly preferential to Galveston and Houston "to the extent that said rates exceed or may exceed the rates on like traffic to Galveston and Houston"; (b) required the carriers to cease and desist on or before April 29, 1954, and thereafter abstain from the undue prejudice found in the preceding paragraph; and, (c) ordered the carriers to establish on or before April 29, 1954, and thereafter maintain rates which would prevent and avoid the undue prejudice described in the first paragraph of the order. This is almost a literal tracking of the § 15(1) provisions. It is not a § 3(1) order, but one fixing the maximum rates to Corpus Christi as the corresponding rates to Galveston and Houston. See *St. Louis Southwestern Ry. Co. v. United States,* 245 U.S. 136, 145. The same is true of the order in Docket 33447.

In *Ayrshire* some of the main contentions were summarized thusly (335 U.S. 593):

> Appellants argue that the Commission acted beyond its authority because it did not afford the

> carriers alternative methods of removing the discrimination which was found to exist. See *Texas & Pacific R. Co. v. United States*, 289 U.S. 627. And Milwaukee argues that the Commission was without power to direct it to cease from granting the undue preference found to exist between its single-line rate and the higher joint-line rates, since it had no control over the latter.

This Court disagreed (335 U.S. 594):

> Section 15(1) gives the Commission power to determine and prescribe the just and reasonable rate once it finds, inter alia, that any rate charged is unjustly discriminating or unduly preferential or prejudicial. The Commission in the present case has exercised that power. It has prescribed approved rates. They are rates which in the Commission's judgment will eliminate the unjust discrimination and undue preference found to exist in this rate structure. Hence the question whether Milwaukee effectively controlled the higher joint-line rates is irrelevant here.

New York and *Ayrshire* make it very plain the I.C.C. is in error when it holds it cannot correct a discriminatory rate situation without finding common control by one or more carriers. It is even more in error when it says it cannot, or will not, strike down rates which are unjustly discriminatory unless it finds such rates also contravene some other prohibition of the Act. Congress has declared discriminatory rates unlawful and has designated the Commission as the agency to enforce that ban. The I.C.C. cannot lawfully refuse to carry out the mandate given to it by Congress.

B. FAILURE TO AGREE ON DIVISIONS

One of the most shocking features of the I.C.C.'s decision is the holding that a carrier can avoid liability for discriminatory rates by showing that it and its connecting line, or lines, have been unable to agree on how to divide the revenue received from a joint rate. This is contrary to virtually everything this Court has held on the subject of divisions, and is a complete reversal of the Commission's prior position on the matter.

There is nothing, of course, in the Act which excuses a carrier from its obligations thereunder if it and its connection(s) disagree on how much of the through rate each is to receive. The I.C.C. exceeds its power and authority when it writes such an exemption into the statute. As succinctly ruled in *Louisville & N.R. Co. v. Sloss-Sheffield S. & I. Co.*, supra, (269 U.S. 234):

> The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole.

While the statement is made about reasonableness of the rate, the same is true insofar as the discriminatory nature of the rate is concerned. Itemizing, the shipper's legitimate concern is that the joint rate as whole is not unjustly discriminatory, not how much of the revenue goes to each carrier. Under the statutes, the shipper cannot be made to suffer from discrimination because the carriers cannot, or will not, agree on divisions. This is confirmed by *Texas & Pacific*, supra, where it was vouched (289 U.S. 649):

> If one or more of the railroads whose lines make up the through route should refuse, upon an order to equalize rates, to afford one of the others a proper division of the rate, the latter may obtain redress from the Commission under section 15(6) (49 USCA § 15(6)).

A similar holding in *St. Louis Southwestern Ry. Co. v. United States,* supra, was (245 U.S. 143):

> If these complaining carriers cannot reach satisfactory agreements with the Illinois Central as to what its share of the 16-cent rate should be, they may, under section 15 of the Act to Regulate Commerce (Comp. St. 1916, § 8583), apply to the Commission for an appropriate order. In respect to the Rock Island the situation is similar.

Up until these proceedings, the holdings of the I.C.C. were in the same vein as a few typical examples demonstrate. In *Ohio Valley Coal Operators Asso. v. I.C.R.R. Co.,* 53 I.C.C. 148, 152 (1919), it was ruled:

> The Illinois Central pleads that the adjustment is controlled by the lines beyond the crossings and that it cannot afford to reduce its divisions on the longer hauls to the more southern crossings to the basis of the divisions to East St. Louis. In the past we have consistently held that the inability of carriers to agree upon divisions is no justification for maintaining unduly prejudicial rates, a remedy being provided by section 15 of the commerce act.

Rate Cancellation from Indiana to Ohio, 66 I.C.C. 449, 451 (1922) held:

> The shipping public must not be made to suffer because of a disagreement between carriers over divisions. The act prescribes the method for adjusting such controversies.

In *Boston Wool Trade Association v. A. & K. Ry. Co.,* 142 I.C.C. 39, 41-42, (1928) it was asserted:

> We have repeatedly said that shippers are not interested in the matter of divisions and are not to be deprived of reasonable rates because carriers are unable to agree as to divisions.

By injecting the offer of divisions as a test of whether a carrier has control of a rate, or rates, the I.C.C. not only makes the public have an interest in divisions, but makes the public's rights under the Act dependent upon connecting carriers being able, or willing, to agree on divisions. This is true even though there is no conceivable way anyone like petitioner can make an agreement regarding divisions for a carrier or, for that matter, even influence a carrier on what divisions it will agree upon. Petitioner submits that under the Act and the decisions of this Court applying it, the I.C.C. cannot validly allow a carrier to establish or maintain unduly discriminatory rates by merely showing such carrier has made a good faith offer of divisions on proposed new rates which offer was unacceptable to the other carrier party to the joint rate.

C. THE SCOPE OF REVIEW

It is indisputable the I.C.C. in these proceedings has set out to, and has, reinterpreted the anti-discrimination provisions of the Act and the decisions of this Court applying the Act. In other words, the I.C.C. has tried to define the duties and obligations of a carrier under the Act with particular reference to that portion of the statute prohibiting discrimination in joint-lines rates. In so doing, it also interprets the Act to determine the scope and extent of its power and authority to condemn joint-line rates as being unduly discriminatory. These are questions of law, not of fact, nor of policy. References to "standards", "tests", "presumption of control", "actual control", and the like cannot be allowed to obscure the true nature of what the I.C.C. has done.

The Commission has no special competence in statutory construction, nor in interpreting the decisions of this Court. Nevertheless, the Court of Appeals felt it was only authorized to review the I.C.C. decision in a limited, or "narrow", way. The Court of Appeals was wrong, and this

Court should not feel any such constraint. This is borne out by numerous decisions of this Court.

While the I.C.C. can interpret the Act, it cannot, by interpretation, change or modify the Act. Neither does its interpretation have any sacrosanct status; it may be persuasive, but it is not binding on a court reviewing Commission action. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Further, as stated in *Securities and Exchange Com. v. Chenery Corp.*, 317 U.S. 80, 94 (1943):

> An order may not stand if the agency has misconceived the law.

Moreover, it is fundamental an agency cannot, by interpretation, usurp the function of Congress or of the courts in determining the scope of the law under which the agency operates, or as is said in *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946):

> An agency may not finally decide the limits of its statutory power. That is a judicial function.,

If anything, more recent decisions restrict the "deference" a reviewing court should give to agency decisions especially those involving statutory construction. *American Ship Building Company v.. N.L.R.B.*, 380 U.S. 300, 318 (1965) held:

> We are unable to find that any fair construction of the provisions relied on by the Board in this case can support its finding of an unfair labor practice. Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.

National Labor Relations Board v. Brown, 380 U.S. 278, 291-292 (1965) ruled:

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.

As the I.C.C. has changed its interpetation of the Act from what it adopted when ports and port districts were included in the Act, we direct attention to the following from *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979):

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congresional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry.

D. THE MOOTNESS QUESTION

The Court of Appeals erred in holding the proceedings in its docket nos. 78-1348, 79-1816, and 80-1842 were moot because the I.C.C. decisions in those cases fall within the principles of *Southern Pac. Terminal Co. v. Interstate Commerce Comm.*, 219 U.S. 498, 513 (1911), and

cases following and expanding that decision.[15] The court below then compounded this error by dismissing the petitions for review instead of remanding those proceedings to the I.C.C. with directions to dismiss.[16] If the proceedings in Docket 36491 (Sub-No. 1) are truly moot, the holding that the Frisco does not have control of the wheat rates from its origins in Kansas and Oklahoma to Corpus Christi should be vacated. Ironically, if those proceedings were moot, there was no justification for the I.C.C. to reopen Docket Nos. 31098 and 33447 and vacate the orders therein.

---

[15] *Soulthern P. Co. v. Interstate Commerce Comm.*, 219 U.S. 433 (1911); *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897); *Federal Trade Commission v. Goodyear Tire & R. Co.*, 304 U.S. 257, 260 (1938); *National Labor Relations Board v. Pennsylvania G. Lines*, 303 U.S. 261, 271 (1938); and, *Walling v. Helmerich & Payne*, 323 U.S. 37, 42-43 (1944).

[16] *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961); and, *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979).

CONCLUSION

The banning of unduly discriminatory rates is a keystone provision of the Act. As this is the first court review of the I.C.C.'s reinterpretation of this provision, these proceedings will undoubtedly be considered a "landmark" decision in the field of transportation law. Because of the importance of the issues, they should be settled by this Court, not a Court of Appeals. For that and the other reasons stated heretofore, certiorari should be granted.

Respectfully submitted,

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No. 82-341

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NUECES COUNTY NAVIGATION DISTRICT NO. 1
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

NUECES COUNTY NAVIGATION DISTRICT NO. 1, et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

PRODUCERS GRAIN CORPORATION, et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

NUECES COUNTY NAVIGATION DISTRICT NO. 1, et al, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

PRODUCERS GRAIN CORPORATION, et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

Nos. 78-1348, 79-1816, 80-1842 and 80-1843.

United States Court of Appeals, Fifth Circuit.

May 6, 1982.

TATE, Circuit Judge:

The petitioners, who represent port and shipper interests in Corpus Christi, Texas, seek review of an adjudication of the Interstate Commerce Commission that a rail rate of a carrier was not discriminatory to Corpus Christi, and of an order of the Interstate Commerce Commission that, *inter alia,* adopted a new standard of "common control" to be used in carrier rate discrimination cases under 49 U.S.C. § 10741(b), and that reopened and vacated two earlier Commission decisions. We affirm the Commission's rule-making and vacation orders, but we find that review of the Commission's discriminatory-rate adjudication is now moot.

The underlying central issue concerns the substantive and procedural propriety of the Commission's actions in adopting a new standard or rule of a narrow nature. The narrow area of the rule focuses on the determination of whether a common carrier has under 49 U.S.C. § 10741(b) subjected a port to rates that are unreasonably discriminatory with regard to those to other ports, in instances where that carrier does not itself provide direct service but must do so by joint rates issued in conjunction with a connecting carrier. The new standard requires a finding that the originating carrier has *actually* contributed to or controlled the rate insofar as it is discriminatory. Under the prior or replaced standard, the originating and connecting carriers were conclusively presumed to have "common control" of the joint rates — that, acting in conjunction as a network, they directly and effectively controlled the rates between the preferred port and the prejudiced port. For reasons to be stated, we find the Commission's adoption of a new rule of decision to be non-arbitrary and within its administrative discretion and the statutory limits for that discretion set by Congress.

We should further note that the Staggers Rail Act of 1980, Pub.L.No. 96-448, 94 Stat. 1895 (1980), was not signed by the President into law until October 14, 1980. Without intimating that our rationale would necessarily be affected otherwise, we note that the Act does not apply to our review of the present decisions of the Commission, which were docketed (and decided) prior to the effective date of the Act. *Id.* § 706.

Introductory Summary

In the attached appendix, we have set forth the full citation and nomenclature of the proceedings and parties to whom we will refer herein. As shown by these proceedings, the context in which the present issues arise is as follows:

In 1977, Frisco (a rail carrier) published reduced carload rates on wheat from origins in Oklahoma and Kansas to various Texas ports (Houston, Galveston, etc. – "other Texas ports"), but not to Corpus Christi. Prior to this publication, the rates had been equal to all Texas ports; the reduced rates for the other Texas ports were about 3 1/2 cents per hundred pounds less than those for Corpus Christi. Various Corpus Christi port and shipping interests protested, including Nueces County (a Texas port district), Producers (a regional grain marketing cooperative with a large-volume grain elevator at Corpus Christi), and Dreyfus (a large-scale shipper of grain that used the Producers elevator at Corpus Christi). The basis of their protest was that the rates were unduly preferential of the other Texas ports, and prejudicial to the Corpus Christi port, in violation of former Section 3(1) of the Interstate Commerce Act, now (in the 1978 recodification) 49 U.S.C. § 10741(b).

Frisco had lowered the rates to the other Texas ports to meet rail and truck rate competition. The reason it had not done so for Corpus Christi was that Frisco had no direct line into that port, and the other connecting rail carriers to that port (MoPac and Southern Pacific) had refused to concur in a lowered joint rate equivalent to that published for the other ports.

In its 1977 decision in *Wheat I* (see appendix for this and other citations herein) rejecting these protests, the Commission held that Frisco was not in control of and did not participate in the disparate rates for Corpus Christi, because Frisco had made a good faith offer of division of the joint rates (to divide the lower rates fairly between the connecting carriers and itself), but these carriers had rejected this offer. Due *inter alia* to the protestant's contention that Frisco's reduced rates to other Texas ports violated outstanding Commission orders in 1954 and 1961 decisions in *Corpus Christi I*, the Commission reopened *Wheat I*. In *Wheat II* (1979), it then reinstated its holding that the Frisco rates to Corpus Christi were not unreasonably discriminatory (for the same reason of Frisco's lack of control thereof), but it also ordered the *Corpus Christi I* cases to be reopened to determine whether those decisions were consistent with *Wheat II*.

In *Corpus Christi I* (1954 and 1961), the Commission had concluded that the joint rates of various carriers transporting grain from the Midwest were unduly prejudicial to Corpus Christi and unduly preferential of the other ports. In so finding, the Commission relied upon a presumed network "common control" of joint rates, so that – if the joint rate was discriminatory – each of the carriers joining in it was held to participate in the discriminatory rate. Accordingly, the Commission entered "alternative orders," which were still in effect at the time

of *Wheat I* (1977) and *Wheat II* (1979). (By an alternative order issued to correct discriminatory rates, the offending carrier(s) are ordered to abate the discrimination by raising one rate, lowering the other, or altering both. *See, e.g., Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 650, 53 S.Ct. 768, 776, 77 L.Ed. 1410 (1933).)

Pursuant to *Wheat II,* after service, notice was published in the Federal Register reopening the *Corpus Christi I* cases (1954 and 1961). *Wheat II,* then before this court on petition for review, was on motion remanded to the Commission for its further consideration. In the resulting *Corpus Christi II,* decided in 1980, the Commission expressly abandoned its former presumed "common control" of joint rates and held that, in the determination of discriminatory rate issues under § 10741(b), it would in the future utilize an analysis of actual control by the originating carrier (applying the good faith order of divisions test enunciated in the *Wheat* cases).[1] It therefore

[1]In *Wheat II,* the Commission discussed in detail how the actual common control-good faith offer of divisions test operates.

According to the Commission, "the protestant has the initial burden of proving that the originating carrier could serve both the preferred and prejudiced parts either by itself or by means of connecting carriers, acting as a network or otherwise." 359 I.C.C. at 603. In *Wheat II,* the Commission noted that Frisco serves the preferred ports directly and can serve Corpus Christi indirectly by means of Southern Pacific or MoPac. *Id.*

Once the protestant has satisfied its burden of showing that the origin carrier could serve both points, the burden shifts to the origin carrier (or to the connecting carriers if they too, have actual control, *see* 364 I.C.C. at 275) to rebut the protestant's evidence of common control by showing that the respondent has made a good faith offer of division of revenues to the connecting carriers, but was unsuccessful in obtaining a concurrence. If the respondent can show that it did make this good faith offer, the Commission contends, "it demonstrates that [the origin carrier] has no actual control of the rates to the ports which it does not serve directly." 359 I.C.C. at 603.

vacated the decisions in *Corpus Christi I* and reaffirmed its holdings in *Wheat I* and *Wheat II*.[2]

Wheat *Adjudications Moot*

Before discussing the viable issues under review, we note of our own motion that the *Wheat* adjudications (that Frisco's grain rates to Corpus Christi are not shown to be unreasonably discriminatory under § 10741(b) are moot.

---

[2]In the *Wheat* adjudications, the Commission likewise rejected the protestant's alternative request that, even if common control be found absent, the Commission could prescribe non-discriminatory rates to Corpus Christi pursuant to 49 U.S.C. § 10704(a)(1), former Section 15(1) of the Interstate Commerce Act. This provision authorizes the Commission, *inter alia*, to prescribe a rate (including a maximum or minimum rate) if, after hearing, it decides that a carrier's rate violates the Interstate Commerce Act as recodified, Subtitle IV, 49 U.S.C. §§ 10101 et seq. The Commission found that, absent Frisco's control of the disparate rates to Corpus Christi, no discriminatory-rate violation of the statute was proved.

Prescription of a rate under section 10704 differs from the issuance of an alternative order under section 10741(b) in that, as the Commission interprets section 10704, the latter is a remedial section that requires violation of some substantive section of the Act as a predicate for rate prescription. (Of course, if the Commission *had* found unreasonable discrimination under § 10741(b), a substantive violation, that would have justified issuance of a rate-prescription; but it did not.) On the other hand, issuance of an alternative order is a specific response to a violation of section 10741(b), prohibiting unreasonable rate discrimination.

No claim was made in the present proceedings that Frisco's rates were "unreasonable" or violated the statute other than being unreasonably discriminatory to Corpus Christi, a contention rejected by the Commission. The Commission expressly noted that its present decision(s) did not preclude the Corpus Christi interests from further proceedings under § 10704 that raised such issue.

In view of our determination that the petitions to review the *Wheat* holdings are moot, we do not reach this issue. *See also* note 6, *infra*.

Following *Wheat I*, MoPac concurred in a reduced joint rate to Corpus Christi equivalent to the reduction published for the other Texas ports. As a result, it is not contested that Corpus Christi is no longer prejudiced by the Frisco rates initially complained of. Accordingly, the three petitions for review that raise issues directed solely to the invalidity of the *Wheat* determinations[3] are dismissed[4] as moot.

No suggestion of mootness is made with regard to the *Corpus Christi II* issues presented by the remaining petition for review. *See* note 3. That decision's vacation of the continuing rate-equalization orders in *Corpus Christi I* deprived Corpus Christi interests of a former remedy by which to attack rail rate disparities; and its adoption by way of rule-making of a new rule (actual control, rather than the formerly presumed common control of joint rates) has obvious continuing effects.

The Issues

The remaining issues presented to us for review may be summarized as follows:

[3]These petitions are our docket nos. 78-1348, 79-1816, and 80-1842. The remaining petition, our docket no. 80-1843, raises still viable issues. See appendix to this opinion.

[4]Before the Commission, where petitioners conceded that *Wheat I* and *Wheat II* were moot for the reason noted, they also contended that the proper remedy was to vacate these decisions rather than to dismiss them, as was suggested also in oral argument before us. Whatever merit this procedural approach to mootness has where issues of res judicata are implicated, see *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950), the policies there involved do not apply here; for, among other reasons, the non-moot *Corpus Christi II, see infra,* itself vacated the *Corpus Christi I* decisions and itself established the new precedential rule concerning "common control" (the harms sought to be avoided by petitioners in having *Wheat I* vacated instead of dismissed).

I. A substantive attack upon the Commission's replacement of the former presumed "common control" rule by the new "actual control" test as an unjustified abrogation by the Commission of its previously settled interpretation designed to advance the anti-discriminatory purposes of the Interstate Commerce Act.

II. A primarily procedural attack upon the Commission's vacation by *Corpus Christi II* in 1980 of its 1954 and 1961 *Corpus Christi I* decisions.

I. *The Commission's Replacement of the Presumed "Common Control" Rule by an "Actual Control" Test*

In the context of the scheme of the Interstate Commerce Act ("the Act"), where carriers are permitted to establish rates for their services, the Act provides that no common carrier may "subject a person, place, port, or type of traffic to *unreasonable discrimination.*" 49 U.S.C. § 10741(b).[5] It is to be noted that this provision includes

[5]Section 10741(b) provides in full:

> A common carrier providing transportation or service subject to the jurisdiction of the Commission under Chapter 105 of this title [49 U.S.C. §§ 10501 et seq., the 1978 recodification of the Act] may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (C) of this section, this subsection does apply to discrimination against the traffic of another carrier providing transportation by any mode.

In an Act of October 17, 1978, 92 Stat. 1337, Congress recodified and simplified the language of the Interstate Commerce Act. Section 10741(b) replaces the former section 3(1) of the Act. Section 3(1) forbade "undue or unreasonable preference or advantage," while 10741(b) forbids "unreasonable discrimination." The recodification was expressly intended to effect no substantive change in the Interstate

within its scope only whether a given carrier provides discriminatory rates to a preferred and to a prejudiced point; it has no application where the rates of a given carrier to one point are disparate with those of another carrier to an equivalent point. *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 649-50, 53 S.Ct. 768, 776, 77 L.Ed. 1410 (1933).

With regard to joint rates to a point – those combined charges for the services of both the originating and the connecting carriers (with division thereof decided between the joining carriers) –, the Supreme Court early stated that

> participation in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination . . . . If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of connecting carriers.

Central Railroad Company of New Jersey v. United States, 257 U.S. 247, 259, 42 S.Ct. 80, 83, 66 L.Ed. 217 (1921). As the Court later stated, reiterating the point: "A carrier or a group of carriers must be the common source

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Commerce Act. The Commission has stated in one of the decisions in the present appeal that "[b]ecause there is no substantive change in the law under the recodified statute and because many of the court and Commission decision (sic) arose under the former act, we shall use interchangeably sections 3(1) and 10741 and the terms "unreasonable discrimination" and "undue preference and prejudice." *Nueces County Navigation District No. 1 v. Abilene & Southern Railway Company,* 364 I.C.C. 269, 270 n. 3 (1980) (*Corpus Christi II*). The petitioners concede that the revision made no substantive change in the Act.

of the discrimination – must *effectively* participate in both rates, if an order for correction of the disparity is to run against it or them." *Texas & Pacific Ry. Co., supra,* 289 U.S. at 650, 53 S.Ct. at 776. (Emphasis supplied.)[6]

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[6]The petitioners argue that the later decisions of *Ayrshire Collieries Corporation v. United States,* 335 U.S. 573, 69 S.Ct. 278, 93 L.Ed. 243 (1949) and *New York v. United States,* 331 U.S. 284, 67 S.Ct. 1207, 91 L.Ed. 1492 (1947) somehow modified the holdings in *Central Railroad* and *Texas & Pacific Ry. Co., supra,* that an *alternative order* to end rate-discrimination may not be issued unless the carrier(s) effectively participated in the discriminatory joint rate. We reject this contention. As the Commission noted, *Wheat II,* 359 I.C.C. at 597-98, these decisions explicitly did not refer to a situation where an alternative order is the appropriate relief. *See, e.g., Ayrshire, supra,* 335 U.S. at 593-94, 69 S.Ct. at 289.

A stronger argument is made by the petitioners, however, that these decisions indicate that, even if an alternative order is not appropriate, the Commission is entitled to *prescribe* rates if the joint rates are unreasonably discriminatory (*i.e.,* even in the absence of joint control). We have previously noted that the mootness of the *Wheat* adjudications precludes our reaching the specific demand for prescribed rates in those cases. See note 2.

Nevertheless, we recognize that a strong argument could be made that the Commission's view as to when rate-prescription is appropriate (rather than an alternative order) in discriminatory rate cases, as enunciated in *Wheat I* and *Wheat II,* could be regarded as non-moot rule-making in *Corpus Christi II;* there, in reaffirming the *Wheat* cases, the Commission specifically modified its *Wheat* "discussion of rate prescriptions in the absence of common control." 364 I.C.C. at 279. We decline to so characterize the *Wheat* rate-prescription "discussion" and its modification in *Corpus Christi II.* While it is difficult to disagree in the abstract with the Commission's view that under present circumstances *Ayrshire* and *New York* do not permit rate prescription unless a rate is *both* unreasonable and discriminatory – and that a rate cannot be discriminatory under the statute unless the carrier effectively participates in it – we do not feel it appropriate to rule upon the propriety of the Commission's views on the matter upon a record devoid of factual data suggesting how the rates at issue could be *unreasonably* discriminatory in violation of section 10741(b), even though no individual rate at issue is either unreasonable or a violation of section 10741(b).

By way of further background, a rate-discrimination case, § 10741(b) is established by showing (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. The complaining party has the burden of proving the presence of the first three factors, and the carriers have the burden of justifying the disparity, if possible, in connection with the fourth factor. *See, e.g., Chicago & Eastern Illinois Railroad Company v. United States,* 384 F.Supp. 298 (N.D.Ill. 1974), *aff'd. mem.* 421 U.S. 956, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975).

The issue before us involves solely the third element needed to establish a claim of discriminatory rate – that the carrier be the "common source" of both prejudicial and preferential rates. The order issued in *Corpus Christi II* – establishing an "actual control" test rather than a presumed "common control" of joint rates – resulted from notice served and published in the Federal Register to the effect that the Commission was "considering moving from a conclusive presumption of common control to an analysis of actual control over the joint rates."[7] The

[7]The notice published at 44 Federal Register 67558-559 (No. 228, November 26, 1979), stated that the Commission was reopening the *Corpus Christi I* decisions and invited briefs and comments. The notice provided:

> *Summary:* The above-captioned cases [the Corpus Christi cases] are being reopened to determine if the port equalization orders entered in these proceedings should be modified. As the orders presently exist, the carriers are required to maintain equivalent rates to both the Houston area ports and Corpus Christi. The orders were entered partly on the basis of the railroads' ability to control the rates to the Gulf ports. Our reexamination of these cases

decision of the Commission in *Corpus Christi II* limited its consideration to this criteria,[8] and its modification of its

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will be limited to the issue of actual control of rates to the Gulf ports and how control of these rates influences the Commission's authority to order relief in cases arising under 49 U.S.C. 10741. We will focus on situations where carriers cannot agree on rate policies and, as a result, concurrences to joint rate changes cannot be secured. We will also explore the circumstances, if any, in which a violation of 49 U.S.C. 10741 might exist if common control of rates is not found when unequal rates are proposed to the Gulf ports. We believe this action is necessary to appropriate regulation in this area.

Supplemental Information: Our purpose in reopening the Corpus Christi cases is to determine whether these outstanding port equalization orders require modification to recognize current rate-making situations not contemplated when the outstanding orders were issued . . . .

* * * * * *

We are considering moving from a conclusive presumption of network common control to an analysis of actual control over the joint rates. The principal test of actual control which we are considering is discussed in *Wheat, Oklahoma and Kansas to Texas Gulf Ports,* 357 ICC 382 (1977), 359 ICC 592 (1979) [*Wheat II*], which is presently pending on court appeal.

An extended analysis of actual common control is a departure from past Commission decisions and directly affects the operation of the Corpus Christi orders. Accordingly, it is necessary to reopen these proceedings and receive comments. Participants should comment on the appropriate legal analysis of the issue of rate control in cases arising under 49 U.S.C. § 10741. Commentors should also address the question of, under what circumstances, if any, unequalized rate proposals should be found to violate § 10741 when there is no common control.

[8]The Commission noted, however, *Corpus Christi II,* 364 I.C.C. at 270:

This limiting of the issues to only one of the criteria

former test to determine whether a carrier is the "common source" of the discriminatory rates is the only substantive issued posed for us by this petition for review.

A. "Presumed Common Control" and "Actual Control" Tests

In *Texas & Pacific Ry. Co., supra,* as previously noted, the Supreme Court had indicated that, for a carrier participating in allegedly discriminatory joint rates to meet the "common source" requirement (*i.e.,* that the carrier be the source of both the prejudicial and the preferential rate), the carrier "must *effectively* participate in both rates." 289 U.S. at 650, 53 S.Ct. at 776 (emphasis supplied).

At the times that the *Corpus Christi I* cases were decided in 1954 and 1961, the Commission used a "network common control" theory to determine whether carriers effectively participated in a discriminatory joint rate. By this test, the Commission, in effect, conclusively presumed common control because the carriers involved acted as a network, so that each was responsible for the joint rate. In the 1954 *Corpus Christi* case, the carriers were found to have effective common control of the rates simply by vir-

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under section 10741(b) was not and is not intended to detract from the importance the Commission places on the other three criteria. The fourth factor, similarity or disparity in transportation conditions, continues to be our primary consideration. It is axiomatic that there can be no discrimination if economic and operational analysis proves that different rates are appropriate. This analysis includes review of matters such as the different distances involved, alternative routings available, differences in the cost of service, and, especially, any differences in competitive conditions.

tue of carrier participation in joint rates. *See* 291 I.C.C. at 469-470. In the 1961 *Corpus Christi* case, the carriers attempted to argue that "no one carrier effectively controls the rates to Corpus Christi and the other allegedly preferred ports." 315 I.C.C. at 162. Without any discussion of the matter, but citing *Texas Pacific Ry., supra,* the Commission asserted that the carriers "acting in conjunction with the originating lines, directly and effectively control the rates." *Id.*

During the 1970's the Commission began to modify its approach to this analysis of common control. For example, in *Soybeans, Midwest to Chicago and Gulf Ports, Export,* 335 I.C.C. 883, 890 (1970), *vacated as moot,* 416 U.S. 953, 94 S.Ct. 1964, 40 L.Ed.2d 303 (1974), the Commission refused to find common control by an origin carrier where connecting carriers refused to concur in rate changes, and where there was no showing of mutual and joint participation in the action alleged to be discriminatory. In *Corn and Soybeans Midwest to Gulf Ports, For Export,* 349 I.C.C. 1, 4 (1974), the Commission held that where a carrier served one port directly and one by means of a joint service with a second railroad, section 10741(b) "does not give this Commission the power to require equalized rates in the event that the second railroad refuses to participate in an equalized joint rates."

The Commission's movement away from applying a conclusive presumption of common control of joint rates culminated in *Wheat I* and, particularly, in *Wheat II.* In the latter decision the Commission explicitly adopted an "actual control" test, see note 1, and explicitly rejected the common-control presumption: "To summarize, because of the need to assure rate flexibility, we have required proof that the railroads actually control the rates to the preferred and prejudiced ports. In this regard, we believe

that the presumption of control extending from the existence of a network such as was found to exist in the Corpus Christi cases is insufficient to assure that actual control exists. While seeking proof of actual control, we have allowed the railroad to show that it does not have such control because it could not, after acting in good faith, arrive at divisions agreements." *Wheat II,* 359 I.C.C. at 604. As a consequence, after service and publication of notice, reopening *Corpus Christi I* to consider a substitution of an actual control test for the former presumption of network control, see note 7, the Commission by way of a rulemaking procedure adopted in *Corpus Christi II* the order presently under review: "The actual control standard shall be used to determine the common source of unreasonable discrimination under 49 U.S.C. 10741(b) in future challenges to carrier rate adjustments to the ports in these proceedings." 364 I.C.C. at 279.

B. The Scope of Our Review

The scope of our review of Interstate Commerce Commission action is reiterated in *Missouri-Kansas-Texas Railroad Company v. United States,* 632 F.2d 392 (5th Cir. 1980), *cert. denied,* 451 U.S. 1017, 101 S.Ct. 3004, 69 L.Ed.2d 388 (1981), which involved, in part, the Commission's adoption of a different standard for determining whether a railway merger is "consistent with public interest." We stated: "We can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record as a whole." *Id.* at 400.

The "arbitrary and capricious" standard is narrow and

permits a reviewing court merely to consider whether the agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971). The "substantial evidence" standard requires a determination that agency findings are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. N. L. R. B.*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938). If the evidence of record is such that it supports inconsistent inferences and conclusions, the courts must defer to administrative choice. *Illinois Central Railroad Co. v. Norfolk & Western Railway Co.*, 385 U.S. 57, 69, 87 S.Ct. 255, 262, 17 L.Ed.2d 162 (1966). This same standard of review is used in our review of a Commission rate determination. *See Systems-Fuels, Inc. v. United States*, 642 F.2d 112 (5th Cir. 1981).

The judicial deference that is accorded to a Commission action of the present nature is attributable to the fact that "the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination." *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, 352-53, 60 S.Ct. 931, 936, 84 L.Ed. 1243 (1940). The broad discretion thus accorded to the I.C.C. in these cases has long been recognized as necessary to the types of value judgments therein involved:

> Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and

> discretion of the Commission . . . and upon which its decisions, made the basis of administrative orders operating in future, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits or for some other reason amount to an abuse of power.

Manufacturers' Ry. Co. v. United States, 246 U.S. 457, 481, 38 S.Ct. 383, 389, 62 L.Ed. 831 (1918).

The "narrow scope within which Congress has confined judicial participation" in the Commission's rate determinations is attributable to the fact that "[t]he process of rate making is essentially empiric . . . fluid and changing . . . [involving] factors that must be valued as well as weighed." Congress has, therefore, given the Commission "the duty of being responsive to the dynamic character of transportation problems." *Board of Trade of Kansas City v. United States,* 314 U.S. 534, 546, 62 S.Ct. 366, 372, 86 L.Ed. 432 (1942).

C. The Actual Common Control Standard

In adopting the actual common control standard, the Commission swept away a presumption of network common control that it used for many years to impose strict liability on carriers based on their participation in joint rates and the presence of interconnecting rail lines. We must now determine, within the narrow scope of review that we have, whether the Commission acted properly in abolishing this former presumption and in adopting, instead, a test that centers on factual issues that determine whether the carrier participated in the *actual* control of the disparate joint rate claimed to be discriminatory.

When we considered a Commission change in policy in the context of railroad mergers, we stated that "it is established beyond argument that an agency may change its policies so long as it identifies and articulates its reasons for doing so." *Missouri-Kansas-Texas Railroad Company v. United States*, 632 F.2d 392, 403 (1980), *cert. denied*, 451 U.S. 1017, 101 S.Ct. 3004, 69 L.Ed.2d 388 (1981). Our opinion in *Missouri-Kansas-Texas* echoed that of the Supreme Court in *American Trucking Associations, Inc. v. Atchison, Topeka, and Santa Fe Railway Company*, 387 U.S. 397, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967), in which the Commission had changed its former interpretations and then argued, much as the Commission does in the present case, that its past interpretation was based on an erroneous interpretation of principles enunciated by various judicial decisions. The Supreme Court did not, however, rest its analysis of the propriety of the Commission change in interpretation on the Commission's argument that its own prior decisions in a course of twenty-five years were *erroneous*. Rather, instead it specifically recognized the ability of the Commission to change its mind and to change its prior interpretations:

> [T]he Commission, faced with new developments or in light of consideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice . . . . Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adopt their rules and practices to the Nation's needs in a volatile, changing economy.

387 U.S. at 416, 87 S.Ct. at 1618.

Our principal concern, then, is to determine whether

the Commission has observed the statutory limits that Congress has set for its discretion, and that the Commission has exercised such discretion and has explained its departure from previous policy so that a reviewing court may determine that the decision is reasoned and not arbitrary. *Burlington Truck Lines v. United States,* 371 U.S. 156, 167-68, 83 S.Ct. 239, 245, 9 L.Ed.2d 207 (1962); *Missouri-Kansas-Texas Railway Company v. United States,* 632 F.2d 392, 403 (1980), *cert. denied,* 451 U.S. 1017, 101 S.Ct. 3004, 69 L.Ed.2d 388 (1981).

Applying the criteria set forth above, we first note that, under section 10741(b) of the Act, Congress gave the Commission a mandate "to protect persons, places, ports, or traffic types from unreasonable discrimination. This duty was reiterated in transportation policy sections of the revised Interstate Commerce Act 49 U.S.C. 10101." *Corpus Christi II,* 364 I.C.C. at 276. "Whether a discrimination in rules or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic." *New York v. United States,* 331 U.S. 284, 347, 67 S.Ct. 1207, 1240, 91 L.Ed.1492 (1947). Despite the petitioners' claims to the contrary, Congress has never sanctioned the "network common control" standard, nor is there any semblance of Congressional intent that such standard be frozen into the administrative process of determining whether joint rates are discriminatory.[9] Thus, the Commission's abolition

[9]Notwithstanding the broad discretion that is necessarily accorded to the Commission in these cases, the petitioners offer two arguments to show that the adoption of the actual common control is contrary to legislative intent.

First, the petitioners argue that Congress adopted the "network" common control analysis because it made certain amendments to the

of the network common control presumption, and its new practice of requiring proof of actual joint control, is not shown to be a matter not entrusted to the Commission's sound discretion.

Likewise, the Commission clearly explained its departure from previous policy so that we may determine whether its decision is arbitrary and not irrationally founded. The Commission provided extended discussions of the actual common control standard in both *Wheat* cases, in its Federal Register annoucement of reopening of the *Corpus Christi I* cases, and in the *Corpus Christi II*

Act after various alleged "network" common control were decided, and did not challenge "network" control analysis. Even if we are to assume that the cases that the petitions cite were true "network" common control cases, we cannot accept the peititioners' argument that all former administrative policy, practice, and regulation are, in effect, "frozen" every time Congress amends or enacts a statute without disputing the current corpus of agency jurisprudence.

Second the petitioners claim that Section 202(f) of the Railroad Revitalization and Regulatory Reform Act of 1976, (the "4R Act"), 49 U.S.C. § 10711, precludes the Commission from changing its policy. Section 10711, provides that ratemaking amendments in the 4R Act should not be construed to modify the application of Section 10741(b). The petitioners conclude from this that Congress impliedly adopted the "network" common control analysis, thus precluding agency abolition of the "network" common control presumption.

There is nothing in the 4R Act to indicate that Congress wished to do anything to upset Commission discretion in discrimination cases; rather, Section 10711 provides only that the 4R Act is not meant to affect the discrimination statute. In addition, although section 101(b)(3) of the 4R Act was not included when the Interstate Commerce Act was recodified in 1978, it is nevertheless helpful in interpreting the effect of the 4R Act *generally*. Section 101(b)(3) of the 4R Act provides that Congress intended to "permit railroads greater freedom to raise or lower rates for rail services in competitive markets." Abolishing the "network" common control presumption certainly tends to effect that policy.

decision itself. The Commission explained that its network common control standard was tantamount to a presumption that imposed strict liability on carriers for the existence of rate disparities. The Commission now wishes to abandon the network common control standard, and adopt a standard that will impose liability only when there is *actual* control, to accord with actual fact rather than resulting from an arbitrary presumption.

Thus, the Commission has determined upon an analysis to be utilized that it deems to be appropriate for the decision of discriminatory rate protests, a matter within its statutory authority. The adoption or change of a method of analysis to be used in the administrative decision of such matters is not shown to be beyond the discretion entrusted to the Commission in its administration of matters statutorily regulated by it. The Commission has clearly articulated a non-arbitrary basis for the method of analysis adopted by it. Finding these criteria are met, judicial review extends no further. We affirm the order in question.

The petitioners produce seemingly endless arguments about the "evils" of the actual control standard. All of these arguments, however, assume that our court may engage in broad review and substitute its judgment for that of the well-reasoned decision of the Commission. We may not.

II. *The Procedural Attack upon the 1980* Corpus Christi II *Vacation of the 1954 and 1961* Corpus Christi I *Decisions.*

In 1979, the Commission reopened the 1954 and 1961 *Corpus Christi I* decisions to determine whether they should be modified and to consider whether the Commission should move from a conclusive presumption of net-

work common control to an analysis of actual control as had been previously discussed in *Wheat II.* The Commission did so after service and after publication of notice (see note 7), in procedures that fully complied with the rulemaking requirements of the Administrative Procedure Act. See *Corpus Christi II,* 364 I.C.C. at 271-72. Ultimately, the reopening led to the Commission's 1980 *Corpus Christi II,* which not only adopted the new actual control standard (see Part I of this opinion), but also to vacation of the *Corpus Christi I* 1954 and 1961 decisions.

The petitioners mount a procedural attack upon the vacation of these prior orders. They contend that in the 1980 reopening of the *Corpus Christi I* case, the Commission should have proceeded by adjudication and not by rulemaking and that the vacation of the *Corpus Christi I* orders were improper. We find no merit to these contentions.

The choice between rulemaking and adjudication "is one that lies primarily in the informed discretion of the administrative agency." *S.E.C. v. Chenery Corporation,* 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947). The Commission is given rulemaking power in section 10321 of the Act,[10] and the Commission may choose to use its rulemaking power as long as it does not abuse its discretion in so doing.

The Commission argues, and we accept, that rulemaking was particularly appropriate in this case because the purpose of re-opening the *Corpus Christi I* cases was to consider the adoption of a new standard of common control that would transcend the interests of the particular

[10]Section 10321 states: "The Commission may prescribe regulations in carrying out this subtitle."

petitioners and carriers originally involved in the *Corpus Christi I* cases. Further, the petitioners have not shown any harm as a result of the agency decision to proceed by rulemaking.

The Commission was entirely reasonable in giving all interested parties an opportunity to comment on agency policy and the Commission did not abuse its discretion in deciding to proceed by rulemaking.

Similarly, the Commission did not act improperly in vacating the *Corpus Christi I* orders. The Commission has authority to reopen cases at any time, and the petitioners' claim that the cases should not be reopened simply because they were decided 18 and 25 years ago is without merit. *Cf., American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532, 540, 90 S.Ct. 1288, 1293, 25 L.Ed.2d 547 (1970). The Commission's vacation of the earlier continuing orders that conflicted with its new policy may reasonably be considered an appropriate method within the Commission's discretion by which it could implement its adoption of the new actual common control standard.

The petitioners' claim that the vacation was improper because it imposes retroactive liability is mistaken, because no retroactive liability was imposed. The original *Corpus Christi I* orders applied prospectively, and the only effect of the adoption of the new standard of actual common control is to permit unequalized rates in the future where no actual common control in fact exists. (If such unequalized rates are in fact proposed, the petitioners of course still have adequate remedy to protest them upon any grounds accorded by law.)

The petitioners' final claim that the Commission should

not have vacated the orders without determining whether common control to Corpus Christi exists under the new standard is without merit. As the Commission points out, the effect of vacation is not to change rates currently on file. If carriers subsequently initiate rate changes, they can be examined on an individual basis.

Conclusion

For the reasons stated:

(1) We DISMISS petitions in our docket nos. 78-1348, 79-1816, and 80-1842, which attack the *Wheat* adjudications that rejected Corpus Christi claims of discriminatory rates, as MOOT.

(2) We AFFIRM the orders complained of by the petition in our docket no. 80-1843, finding that these orders, (a) adopting the new actual control standard and (b) reopening and vacating the 1954 and 1961 *Corpus Christi I* orders, were procedurally proper and within the Commission's authority and discretion.

DISMISSED AS MOOT IN PART: AFFIRMED IN PART.

APPENDIX

The Consolidated proceedings before us result from four petitions for review of Interstate Commerce Commission, ("the Commission" or "the I.C.C.") orders:

1. Our docket number 78-1348, being a petition filed by the Nueces County Navigation District No. 1, Corpus Christi ("Nueces County"), a political subdivision of the State of Texas, which seeks review of a report and order of the Commission dated December 19, 1977, *Wheat, Oklahoma and to Kansas to Texas Gulf Ports,* I.C.C. docket no. 36491 (Sub-No. 1), 357 I.C.C. 382 (1977), a decision that held that the reduced rates of wheat from points in Oklahoma and Kansas to various Texas ports was not unduly preferential to them nor prejudicial to the Corpus Christi port. We will refer to this decision as *Wheat I.*

2. Our docket number 79-1816, a petition by Nueces County and by Producers Grain Corporation ("Producers Grain"), a regional grain marketing association of Amarillo, Texas, which seeks review of an I.C.C. decision of February 2, 1979, *Wheat, Oklahoma and Kansas to Texas Gulf Ports,* I.C.C. docket no. 36491 (Sub-No.1), 359 I.C.C. 592 (1979), which (after reopening *Wheat I*) reaffirmed its action on broader basis. We will refer to this decision as *Wheat II.*

3. Our docket number 80-1842, another petition by Nueces County and by Producers Grain, which seeks review of an I.C.C. decision dated July 21, 1980, *Nueces County Nav. Dist. No. 1 v. Abilene & Southern Ry. Co.,* I.C.C. docket no. 31098 (but also embracing I.C.C. docket nos. 33447 *Nueces County Nav. Dist. v. Atchison, T & S.F. Ry.,* and 36491 (Sub-No. 1), *Wheat Oklahoma*

and Kansas to Texas Gulf Ports), 364 I.C.C. 269 (1980)), a decision that:

(a) vacated earlier orders in I.C.C. docket nos. 30918, *Nueces County Navigation District No. 1 v. Abilene and Southern Railway Company,* 291 I.C.C. 459 (1954), and in docket no. 33447, *Nueces County Navigation District v. Atchison T & S.F. Railway Company,* 315 I.C.C. 155 (1961) – to be referred to as the *"Corpus Christi I"* cases. These previous decisions had held joint rail rates discriminatory as to Corpus Christi based upon the Commission's former presumed "common control" rule;

(b) held that a new "actual control" (of a discriminatory rate) standard, adopted in the opinion, shall be used in the determination of unreasonable discrimination in future challenges to carrier rate adjustments to the ports in these proceedings instead of a former presumed "common control" of joint rates that were discriminatory; and

(c) affirmed the decision in *Wheat I* and *II, supra,* insofar as it applied the actual control analysis, but modified its discussion relative to rate *prescription* in the absence of common control. We will refer to this decision as *Corpus Christi II.*

By this petition for review, Nueces County and Producers Grain reiterate their objections to the holdings in *Wheat I* and *II* and reaffirmed in *Corpus Christi II,* that the reduced rail rates of wheat to various Texas ports were not discriminatory to the Corpus Christi port.

4. Our docket number 80-1843, is yet another petition by Nueces County and by Producers Grain that seeks review of the same July 20, 1980 I.C.C. decision, *Corpus Christi II, supra,* but which in this instance attacks the

reopening of the earlier 1954 and 1960 Nueces County decisions (the (a) holding above), and also attacks the decision's adoption of the new "actual control" standard in the above (b) portion of the ruling.

A number of parties have intervened in the proceedings before us.

In support of the respondent Commission, the following rail carriers intervened: The Missouri Pacific Railroad ("MoPac"); the Southern Pacific Transportation ("Southern Pacific"); the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe"); and Burlington Northern Inc. (successor in interest to the St. Louis-San Francisco Railway Company – the "Frisco" Railway). Houston Port Bureau, Inc., also intervened in support of the respondent Commission's orders.

The Bunge Corporation and the Louis Dreyfus Corporation ("Dreyfus") intervened in support of the petitioners, Nueces County and Producers Grain.

APPENDIX B

No. 36491 (SUB-No. 1)

WHEAT, OKLAHOMA AND KANSAS TO TEXAS GULF PORTS

Decided December 19, 1977

Reduced rates on wheat from points in Oklahoma and Kansas to Galveston, Houston, Texas City, Beaumont, and Port Arthur, Tex., for export found not to be unduly preferential of those ports and prejudicial to Corpus Christi, Tex., or otherwise unlawful. Proceeding discontinued.

Donald E. Engle, Hugh L. McCully, Donald E. Ranson, and Donal L. Turkal for respondents.

Frank C. Brooks, Andrew P. Goldstein, and *Raymond R. Nolen* for protestants.

G. E. Strange for intervener in support of respondents.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

By schedules effective February 20, 1977, respondent, St. Louis-San Francisco Railway Company (Frisco or respondent) published reduced carload rates[1] from 1 to 3 1/2 cents lower than previously effective rates on wheat from

[1]Rates are stated in amounts per hundred pounds.

origins to Oklahoma and Kansas[2] to the Beaumont, Galveston, Houston, Port Arthur, and Texas City, Tex., ports for export, but not to the port of Corpus Christi, Tex. Prior to the reductions, the Frisco maintained identical rates to all the above destinations. Upon protest of Louis Dreyfus Corporation (Dreyfus) and the joint protest of Nueces County Navigation District No. 1 (District) and Producers Grain Corporation (Producers), all of which represent Corpus Christi interest, and protest of Texas Grain and Feed Association (Texas Grain), representing various Texas grain elevators and feed mills, the investigation of the proposed rates was entered into by order dated February 16, 1977 (served February 24, 1977). Because Frisco claimed in initial statements that the failure to afford reduced rates to Corpus Christi was due to the nonconcurrences by the Missouri Pacific Railroad Company (MoPac or MP) and Southern Pacific Transportation Company (Southern Pacific or SP), we broadened the investigation by order dated August 4, 1977, to designate these carriers as respondents.

In our initial consideration of the evidence, we found significant questions had been raised as to the possible preferential treatment of the Beaumont, Galveston, Houston, Port Arthur, and Texas City ports and the possible prejudicial treatment of the port of Corpus Christi, a situation which would violate section 3(1) of the act. One of the elements to establish a section 3(1) violation is that the originating carrier has control of both the preferred and prejudiced rates. Respondent alleged in its initial statement that it did not have common control over both

[2]Arkansas City and Winfield, Kans., and Bender, Blackwell, Eddy, Goltry, Grainville, Helena, Lamont, Middletown, Peckam, and Salt Fork, Okla.

the allegedly preferred and prejudiced rates since it could not force connecting lines to concur.

In situations where one railroad serves one port directly and the other port by joint service with a second railroad, this Commission has stated that a carrier does not have common control if it offers to establish equivalent service at equivalent rates, but the connecting carrier declines. *Corn & Soybeans Midwest to Gulf Ports,* 349 I.C.C. 1, 4 (1974). The initial statements showed that the Frisco requested concurrences from other carriers, some of which concurred while others did not.

In our order dated September 8, 1977, we stated that we were no longer satisfied that offers of divisions by originating carriers are sufficient by themselves to demonstrate a willingness to provide equivalent service at equivalent rates, unless it is clearly and convincingly shown by the carriers that these offers were made in good faith. The order further stated:

> Without such a showing, the originating carrier may predicate the lower joint rate upon a division of revenues which substantially reduce the share of the connecting carrier or carriers. By so doing the origin carrier could virtually compel the non-concurrence of the connecting carriers. In order to establish that it has made good faith offers of divisions with non-concurring railroads, respondent should submit evidence showing: (1) the amount and proportion of the offer of divisions in the case at issue; (2) the amount and proportion of the established basis of division, if any, on the particular commodity and over the particular route; and (3) the amount and proportion of the established basis of divisions and identical or comparable commodities

over identical or comparable routes. Respondent may also submit any other evidence, including cost data, to support its case.[3]

Respondent Frisco depicts the reduction as necessary to meet the direct competition of The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and the Chicago, Rock Island and Pacific Railroad Company (Rock Island), both of which published similar reduced rates on wheat.

In Investigation and Suspension Docket No. 9132, *Wheat, Kansas and Oklahoma to Texas Gulf Ports,* decided February 7, 1977,[4] the Santa Fe's reductions were found just and reasonable and not otherwise in violation of the Commission's order in docket No. 31098, *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.,* 291 I.C.C. 459 (docket No. 31098) and docket No. 33447, *Nueces County Nav. Dist. No. 1 v. Atchison, T. & S. F. Ry. Co.,* 315 I.C.C. 155 (docket No. 33447).

Frisco refers to the testimony in I.&S. Docket No. 9132, wherein Santa Fe justified its reductions on the basis that successive general increases had increased the rail rates to the extent that motor carrier competition was becoming a significant factor. Frisco claims that, while it is affected by motor carrier competition, it is more directly affected by the reduced Santa Fe and Rock Island rates. Maps submitted by Frisco illustrate the close proximity of Frisco's, San-

[3]This criteria was subsequently modified to require (1) information relevant to the offer of divisions in the issue case and (2) information relevant to any established bases of divisions on similar or identical commodities over similar or identical routes. Supporting detail, including cost data, proportional rates, or other basis for divisions offers can be submitted.

[4]Appeal docketed *sub nom., Producers Grain Corporation* v. *Interstate Commerce Commission,* No. 77-1788 5th Cir.

ta Fe's, and Rock Island's lines. Respondent draws the conclusion that without these reductions, wheat will move either by the competing rail carriers or trucks.

Union Equity Co-Operative Exchange (Union Equity), which supports the reduction herein, is a regional cooperative with 226-member elevator organizations located in 7 States, and has elevators totaling 50.3 million bushels storage capacity at Enid, where a considerable amount of grain is stored during the harvest season. Enid, Okla., located no further than 90 miles from the involved origins, is an important transit point for the grain trade. Union Equity also has elevators at Forth Worth and Houston, Tex., with capacities of 5 and 6.5 million bushels, respectively.

The table below shows the amount of grain handled by the Frisco from all origins to Enid and from Enid to various gulf ports.

St. Louis-San Francisco Railway Company
shipments handled to and from Enid, Okla.

	1973	1974	1975	1976
All origins to Enid, Okla	640	1,093	1,276	2,125
Enid to Beaumont, Tex	446	503	295	54
Enid to Corpus Christi, Tex.	14	32	70	111
Enid to Galveston, Tex	37	63	105	351
Enid to Houston, Tex	2,584	2,118	2,503	2,055
Enid to Port Arthur, Tex	14	62	11	31
Total Enid to the Texas ports ...	3,095	2,778	2,984	2,602

Union Equity argues that general increases have distorted the rate structure between various "rate-break" border points, so that in one instance stations only 6.6

miles apart have seen an increase from a 2-cent differential (30 and 32 cents) between the two stations in 1968 to a 4-cent differential in 1977 (66 and 70 cents). The issue rates would reduce this individual differential 1.5 cents (66 and 67.5 cents). These differentials in the transportation costs force the disadvantaged elevators either to absorb the rate differential or obtain a cheaper means of transporting their wheat, purportedly by trucks. Evidence was also presented to show that wheat has moved via truck from nine of the involved origins to both Enid and Houston.

The Houston Port Bureau, Inc., which represents the port of Houston in transportation matters, includes in its membership organizations which own elevators with total capacity of 27 million bushels. It argues that the Frisco must be permitted to meet both rail and motor carrier competition. It also contends that since the port of Houston has more available capacity than protestants, it will draw more export grain through its facilities. In order to accomplish this, it states that competitive rates must be available.

As stated, protestants to this proceeding include the District and Producers, both of which filed a joint statement, and Dreyfus, and Texas Grain. Producers is a regional grain marketing cooperative association with 6.4 million bushel capacity elevator located at Corpus Christi. The exporting of bulk grain through the Corpus Christi port is one of Producers' principal operations, with wheat accounting for 31.3 percent of the total volume from 1972 through 1976. Producers' witness has testified that the Commission decisions in docket Nos. 31908 and 33447, *supra,* were a major factor in Producers' decision to purchase its Corpus Christi elevator facility.

Producers testifies that the rate reductions work out to 6/10 of 1 cent to 2.1 cents per bushel and that, other factors being equal, a difference of a fraction of a cent per bushel will determine if a contract will be made between buyer and seller.

Producers acknowledges that it cannot directly identify the quantity of wheat it has received in the past from the issue origins, but points out that since wheat loses its origin identity when loaded into a terminal elevator, it is possible that a substantial amount of wheat originated at the issue origins. According to its corporate records, from 1972 through 1976 there were over 8,600 railcars containing wheat billed at Wichita, Kans., Enid and Fort Worth which were unloaded at the Corpus Christi terminal. As further evidence of its need for the reduced rates, Producers submits that it has obtained 11 new members in Kansas and Oklahoma since January 1, 1976, although it does not state whether those members are affected by the reductions herein.

In attempting to obtain the issue rates to Corpus Christi, Producers contacted both MoPac and Southern Pacific and requested their concurrence in the (then) proposed rates. MoPac refused on the basis that "(d)etailed study of economics involved prohibits our participation in joint routes." Southern Pacific provided a similar explanation:"***this publication does not generate sufficient revenues to cover cost of performing services."

Producers criticizes these refusals and refers to MoPac's and Southern Pacific's participation in joint-line rates from Texas origins to Corpus Christi and Laredo, Tex., for export. According to protestant, for traffic in which MoPac and Southern Pacific concur, revenues for wheat, 110,000-pound minimum, range from $1.08 to $1.24 (average $1.15) per car-mile while the revenues provided

by the reduced rates at issue, 150,000- and 190,000-pound minima, would yield from $1.06 to $1.64 (average $1.38) per car-mile.

District operates facilities at the port of Corpus Christi, including a shipside grain elevator with a 5.6 million bushel capacity.

District states that most wheat coming from Kansas and Oklahoma is shipped to Corpus Christi from terminal rather than country elevators. It points out that while the reduced rates at issue originate at country elevators, most of the wheat from these origins will ordinarily move into a terminal elevator, such as located at Enid. Thus, although the Frisco originated 111 cars in 1976 for shipment from Enid to Corpus Christi, it would not be possible for the District to ascertain how much of this wheat, if any, came from the involved origins. Rate comparisons have been submitted to demonstrate that the reduced rates, effective February 20, 1977, and subject to the Ex Parte No. 336 increase, are between 0.5 cent below to 2 cents above the Ex Parte No. 330 level effective October 7, 1976. Because all the carriers participated in these rates at the Ex Parte No. 330 level, District implies these carriers should publish the reduced rates since they would generally furnish revenues above the Ex Parte No. 330 level.

Dreyfus argues that the Frisco claim of motor carrier competition has not been sustained by independent evidence, but that the principal reason behind Frisco's rate reductions is the Commission decision in I.&S. Docket No. 9132, *supra,* wherein similar reductions were granted to the Santa Fe. Since the Frisco's reduced rates were published to become effective February 20, 1977, the end of the suspension period in I.&S. Docket No. 9132, and not before, Dreyfus believes that these rates are published as a direct response to the Santa Fe rate reductions.

Protestants, in their respective arguments, contend that the rates violate the existing orders of docket Nos. 31098 and 33447, *supra*. Producers, District, and Dreyfus contend that the main issue is whether a carrier can avoid the port equalization orders or the constraints of section 3(1) when, through independent action, it only has to state that it is willing to join its connections in publication of the reduced rates. Since Frisco does not reach any gulf ports nor do MoPac and Southern Pacific directly serve any of the origins, Producers and District contend that the joint-line rate is not controlled by any particular party, but that the rate is collectively controlled by all the parties to the rate. It is also alleged that there are no transportation conditions which justify the higher rates. Producers and District also argue that the reduced rates violate section 1(4) of the act which requires railroads to maintain just and reasonable rates and reasonable routes.

In its reply, Frisco has extended its exhibit showing the number of cars from the involved origins to the transit points of Wichita and Fort Worth. A total of 270 cars of wheat moved from the origin points to the transit points between 1973 and 1976, while during this same period 65 and 86 carloads of wheat moved from Forth Worth and Wichita, respectively, to Corpus Christi.

Frisco criticizes Producers' presentation because it only showed the wheat coming from the transit points and not the specific origins involved in this proceeding. Other figures were criticized because they related to grain in general and not wheat specifically.

Frisco argues that if this rate decrease is denied, protestants would not benefit since the wheat traffic handled by Frisco will instead be handled by the Santa Fe, the Rock Island, and motor carriers. With respect to motor

carrier competition, it is alleged that this competition, described in I.&S. Docket No. 9132, *supra,* has radically changed since docket Nos. 31908 and 33417 which were decided in 1953 and 1961, respectively. Frisco refers to the development of an extensive interstate highway system and the heavy trucks which use this system.

Division and Costs of Service

In its initial presentation, Frisco presented cost evidence relating to the through movement. On reopening the record, Frisco submitted testimony detailing its present and proposed offers of divisions. In response to this latter testimony, Dreyfus costed the service for each carrier and related these costs to the present and proposed offers of divisions.

In developing its cost evidence for the through movement, Frisco selected Helena and Winfield because they represented the shortest and longest distances, respectively, to Enid. The evidence was based on wheat shipments transited at Enid and moving under carload minimum weights of 150,000 and 190,000 pounds. Variable costs were based on the application of the Commission's Rail Form A, Statement No. 1F1-73, "Formula for Use in Determining Rail Freight Service Costs" to the 1975 expenses and statistics of those rail carriers assigned to region VII (Western District). Respondent adjusted those regional average costs for weight, switching costs and charges, interchange and through train, and way train movements. District and Producers criticized this cost presentation and state that the study should have been based on the unit costs of the actual railroads and that an actual average lading weight of 200,000 pounds should have been used. However, respondent and protestants are in agreement that the reduced rates are profitable.

It should be noted that we are unable to verify the 1975 costs computed by respondent. Additionally, respondents' evidence has several deficiencies. The carriers are region V carriers except for Southern Pacific, which is a region VI carrier. Furthermore, respondent failed to explain the procedures it used to update its costs and the methods it used in adjusting the 1975 unit costs to reflect tare weight and terminal switching adjustments.

We have developed costs from Winfield and Helena to Corpus Christi based on statement No. ICI-74, "Carload Cost Scales, 1974." Adjustments have been made to reflect the following specific movement characteristics: tare weight, way and through train costs, actual interchange costs on a loaded car-mile basis, inclusion of an absorbed switching cost on movement to Galveston, and a 50-percent reduction in origin and destination terminal switching costs and freight train costs reflecting the economics associated with multiple car movements. Our restatement is shown below.

Costs, rates and rate/cost comparisons as computed by the Section of Cost and Valuation as well as respondent's variable cost computations

Movement description	Actual miles	Weight (pounds)	Frisco's variable cost computations January 1977 cost level	Variable cost per carload at September 30, 1976 cost level[1]	Total revenue per carload	Revenue/cost comparison col. 6 ÷ col. 5
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Winfield, Kans., Transit Enid						
1. Enid to Galveston	859.7	150,000	$945.56	$834.31	$1,192.50	143
2. Enid to Houston	807.6	150,000	919.83	779.90	1,192.50	153
3. Enid to Galveston	801.5	150,000	906.35	797.93	1,192.50	149
4. Enid to Houston	749.4	150,000	880.62	743.53	1,192.50	160
Helena, Okla., Transit Enid						
5. Enid to Galveston	837.3	190,000	991.85	886.23	1,282.50	145
6. Enid to Houston	746.7	150,000	862.80	726.97	1,012.50	139
7. Enid to Galveston	826.8	190,000	983.83	878.79	1,282.50	146
8. Enid to Houston	688.5	150,000	823.59	690.60	1,012.50	147
Winfield, Kans., Transit Enid						
9. Enid to Corpus Christi	925.7	190,000	1,087.81	977.63	1,510.50	155
10. Enid to Corpus Christi	969.5	190,000	1,034.27	1,009.74	1,510.50	150
11. Enid to Corpus Christi	1,009.4	150,000	1,055.78	906.03	1,192.50	132
Helena, Okla., Transit Enid						
12. Enid to Corpus Christi	864.8	190,000	1,022.39	917.01	1,282.50	140
13. Enid to Corpus Christi	908.6	190,000	968.85	949.12	1,282.50	135
14. Enid to Corpus Christi	948.5	150,000	998.75	853.10	1,012.50	119

See footnote at end of table.

[1]Costs were updated to the September 30, 1976 cost level utilizing the Commission's suggested update procedure outline in I.C.C. Statement No. 2-58, "Rail Carload Cost Scales by Territories as of January 1, 1958."

As the restatement shows, the reduced rates contribute substantial revenues above variable costs.

As previously stated, we requested information as to the offered divisions. Frisco has complied by submitting the divisions as used on the present rates and those proposed to MoPac and Southern Pacific. Protestants have analyzed this evidence, relying on costs and comparisons of car-mile revenues.

The statements submitted by respondent are contained in appendixes A and B. Appendix A shows the divisions between respondent and MoPac in percentages and in revenues, both present and proposed, and compares the divisions from the issue origins to Houston and Corpus Christi. Twenty-four rates are shown; only six involve reductions, but all are on rates to Corpus Christi. These reductions range from 0.2 to 0.7 cents, while Frisco's share is reduced in all instances and varies from 0.7 to 3.5 cents. The statement for the Southern Pacific (appendix B) involves only the Corpus Christi destination. All the rates to Corpus Christi have reductions which range from 0.3 to 1.1 cents. Frisco's share is again reduced in all instances, the reductions ranging from 0.6 to 2.4 cents.

Frisco has testified that the divisions offered to the connecting carriers reflect the same percentage divisions as previously concurred in by the connecting carriers.

Southern Pacific states that its participation in any rate adjustment is conditioned on its earnings for those rates. This carrier emphasizes that it is not the normal railroad pricing procedure of carriers operating in this particular geographical territory to become involved in questions regarding divisions each time a rate change is being considered, because to adjust those divisions each time a rate is reduced would result in unmanageable situations. Only on rare occasions is a special basis of divisions agreed upon which alters the prevailing basis, and in many cases those changes are related only to additional routings on present rates. Southern Pacific points out that the subject rates were progressed by independent notices and that Corpus Christi delivering lines were not consulted as to the level of rates to be established nor were they ever advised as to the reasons that Frisco felt it was imperative to publish the reduced rates. It is Southern Pacific's position

that had it been consulted, it would have advised the Frisco that the rates should not be progressed because revenues accruing for Southern Pacific's account were less than Rail Form A variable costs for the service. Southern Pacific also has testified that the Frisco has never made any offer of revised divisions. Southern Pacific alleges that its variable cost from its connection with the Frisco at Fort Worth to Corpus Christi is 26.22 cents in a rail-owned covered hopper car with net load of 190,000 pounds contrasted with the 24.6 cents share of the revenue the Frisco has proposed to allow Southern Pacific for this service.

Protestants, District and Producers, in their joint statement dated October 17, 1977, provided a table depicting total railroad mileage from the 12-named origins to Corpus Christi, Tex. From each origin the mileage is stated to reflect (1) Frisco's mileage from origin to interchange point at Fort Worth or Dallas, Tex.; (2) MP mileage from Fort Worth to Corpus Christi; and (3) SP mileage from Dallas to Corpus Christi. Also shown are Frisco's, MP's, and SP's percentage distribution of the total mileage and, in a subsequent table, protestants have calculated Frisco's percentage share of the total through revenues. Furthermore, in response to Frisco's second opening statement, those protestants have presented certain selected car-mile earnings from various origins. Such revenue data was extracted from respondent, Frisco's showing of divisions and minimum revenues from the involved rail carriers.

Protestant Dreyfus submitted a study of the variable costs associated with the movement of the subject traffic from 12 Frisco origins to Houston, Galveston, Port Arthur, and Corpus Christi, Tex. Cost data relative to fully allocated costs have also been presented, as well as a comparison of the proposed revenue divisions with the variable costs for each of the participating carriers.

Costs submitted by Dreyfus are based on 1975 Rail Form A territorial average costs for regions V and VI, updated to reflect wage and price levels as of April 1977. The development of such costs reflects movements of wheat in covered hopper cars carrying a net load of 200,000 pounds. Mileages were based on tariff route distances furnished by Louis Dreyfus Corporation. The study also includes switching costs of the Houston Belt and Terminal Company (HB&T) and the Port Terminal Railroad Association (PTRA) at the Houston destination, as well as a switching charge of $42.24 per carload made by the Galveston Wharves Railroad.

Dreyfus has also included the cost applicable to interchange switching for the movement from Frisco to the switching lines at Galveston and Houston, that is, interchange with HB&T, PTRA, and Galveston Wharves Railroad.

Regarding interchange costs at Corpus Christi, Dreyfus notes that the service to the public elevator is provided every third year by either the SP, MP, or Texas-Mexican Railway. Switching service to the private elevator, operated by Producers Grain Corporation, is provided by MP. Accordingly, Dreyfus included the costs of only one-third of an interchange on SP movements to Corpus Christi, since SP incurs one full interchange cost every 3 years. On movements via the MP to Corpus Christi, Dreyfus included a weighted average of one-third an interchange for that carrier since there is no interchange involved in the movement to Producers' elevator and only two-thirds of an interchange involved on movements to the public elevator.

Dreyfus' cost witness has updated 1975 Rail Form A variable costs to an April 1977 cost level using the index computed by the Western Railroad Association, adjusting

the index downwards slightly so that it may be applicable to Rail Form A costs which include not only operating expenses, rents, and taxes, but also the cost of capital.

After computing the variable costs applicable to the issue traffic, Dreyfus developed a table depicting the rates, variable costs, and rate-cost comparisons for through movements originating on the Frisco, at Winfield and Helena, to the gulf ports of Galveston, Port Arthur, Houston, and Corpus Christi. Data were shown separately for shipments with one transit stop at Enid and for nontransit shipments. This data indicate that on transited movements from the two origins, the proposed reduced rates produce ratios of revenues to variable cost ranging from 120 to 149 percent on the through movement. On nontransit shipments, the reduced rates range from 139 to 175 percent of through movement variable costs.

Dreyfus has also computed the average ratio of rate to variable costs for these movements. These computations are alleged to show that the ratio of the average rate to variable costs ranges from 128 to 139 percent on transited shipments and 148 to 164 percent on nontransited shipments. Dreyfus concludes that the reduced rates involved in this proceeding cover the railroads' fully allocated costs (based on the allocation of constant costs on a dollar basis) since an examination of Rail Form A application for regions V and VI indicates that the total constant expenses amount to approximately 28 percent of total variable expenses.

In addition to presenting evidence relating to the compensatory nature of the through movements, Dreyfus has also submitted variable costs per hundredweight and applicable divisions for the Frisco's portion of the haul via the various routes to Corpus Christi, as well as the con-

necting carriers' portion of the haul. The results of this showing are set forth below:

Origin and routing	Variable cost cents per cwt.		Revenue division cents per cwt.		Ratio: revenue to variable cost	
	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Winfield, Kansas					*Percent*	*Percent*
Frisco-Dallas-SP	34.2	23.7	54.9	24.6	161	104
Frisco-Ft. Worth-SP	35.1	24.6	54.9	24.6	156	100
Frisco-Ft. Worth-MP	35.1	24.2	54.5	25.0	155	103
Helena, Oklahoma						
Frisco-Dallas-SP	30.9	23.7	45.9	21.6	149	91
Frisco-Ft. Worth-SP	31.8	24.6	45.9	21.6	144	88
Frisco-Ft. Worth-MP	31.8	24.2	44.2	23.3	139	96

According to Dreyfus' tables the revenue divisions allowed to the connecting carriers produce revenues which are below, or only marginally higher than, the variable costs incurred by the connecting carriers. Furthermore, Dreyfus notes that the costs, shown for Frisco, include the cost of transit and if no transit was provided, Frisco's costs would be almost 8 cents per hundredweight lower. As a result, Frisco's division of the revenue would be even more remunerative.

Although SP attempted to show some evidence relative to costs of service consideration, it provided no support or explanation of the variable costs it introduced. However, the variable cost SP shows for the movement from Winfield, Kans., to Corpus Christi, Tex., with interchange at Forth Worth is only slightly higher than the variable cost computed by protestant Dreyfus for the same movement,

(i.e. 26.22 cents compared to 24.6 cents). Accordingly, we believe the variable costs shown by SP is not unreasonable.

We are unable to verify the cost presented by Dreyfus since the Commission's most recent Rail Form A reflects only those costs for the year 1974. However, we find protestant's cost methodology to be acceptable for the most part. Dreyfus' use of an average actual lading weight more appropriately reflects the costs incurred in handling the issue traffic since costs are predicated upon the actual weight being transported rather than the tariff minimum weight. Dreyfus' exclusion of regional average switching costs at destination and its inclusion of switching charges paid to terminal switching companies, at Houston and Galveston, is acceptable.

Based on the routings shown in Dreyfus' cost study, it appears that the number of interchanges was overstated. However, we have not restated the cost applicable to the through movements since such restatement would not alter the showing that revenues exceed variable costs on those movements by substantial margins.

With respect to the interchange reflected in the cost of movements from either origin to Corpus Christi, Dreyfus has improperly computed the cost of providing service in any given year. The use of average interchange costs understates the total costs of providing service in a year in which MoPac or Southern Pacific must interchange the traffic to the public elevator. Furthermore, average interchange costs overstate the total costs in a year on which MoPac or Southern Pacific serve the public elevator directly. Accordingly, we have restated the costs shown by Dreyfus to reflect actual interchange costs incurred by the involved carriers in the movement to Corpus Christi. Our

restatement is shown below and reflects revenues and costs in cents per hundredweight for the Frisco as well as the connecting carriers. It should be noted that protestants' use of one-third of an interchange cost would reflect the appropriate expense incurred by the connecting carriers if one were examining the cost of service for a 3-year period.

Origin and routing	Variable cost cents per hundredweight		Present: Revenue division cents per hundredweight		Present: Ratio: revenue to variable cost		Proposed: Revenue division cents per hundredweight		Proposed: Ratio: revenue to variable cost	
	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Winfield, Kansas					*Percent*	*Percent*			*Percent*	*Percent*
Frisco-Dallas-SP										
(a) Delivery to public elevator by SP	33.5	22.4	55.5	25.0	166	112	54.9	24.6	164	110
b) Delivery to public elevator by MP or Tex-Mex	33.5	23.2	55.5	25.0	166	108	54.9	24.6	164	106
Frisco-Ft. Worth-SP										
a) Delivery to public elevator by SP	34.5	23.3	55.5	25.0	161	107	54.9	24.6	159	106
b) Delivery to public elevator by MP or Tex-Mex	34.5	24.1	55.5	25.0	161	104	54.9	24.6	159	102
Frisco-Ft. Worth-MP										
a) Delivery to public elevator by MP	34.5	23.1	55.2	25.3	160	110	54.5	25.0	158	108
b) Delivery to public elevator by SP or Tex-Mex	34.5	23.8	55.2	25.3	160	106	54.5	25.0	158	105
c) Delivery to private elevator by SP	34.5	23.1	55.2	25.3	160	110	54.5	25.0	158	108

Origin and routing	Variable cost cents per hundredweight		Present: Revenue division cents per hundredweight		Present: Ratio: revenue to variable cost		Proposed: Revenue division cents per hundredweight		Proposed: Ratio: revenue to variable cost	
	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Helena, Oklahoma					*Percent*	*Percent*			*Percent*	*Percent*
Frisco-Dallas-SP										
(a) Delivery to public elevator by SP	30.3	22.4	46.6	21.9	153	98	45.9	21.6	151	96
b) Delivery to public elevator by MP or Tex-Mex	30.3	23.2	46.6	21.9	153	94	45.9	21.6	151	93
Frisco-Ft. Worth-SP										
a) Delivery to public elevator by SP	31.2	23.3	46.6	21.9	149	94	45.9	21.6	147	93
b) Delivery to public elevator by MP or Tex-Mex	31.2	24.1	46.6	21.9	149	91	45.9	21.6	147	90
Frisco-Ft. Worth-MP										
a) Delivery to public elevator by MP	31.2	23.1	45.2	23.3	145	101	44.2	23.3	142	101
b) Delivery to public elevator by SP or Tex-Mex	31.2	23.8	45.2	23.3	145	98	44.2	23.3	142	98
c) Delivery to private elevator by MP	31.2	23.1	45.2	23.3	145	101	44.2	23.3	142	101

The results of our restatement do not materially alter the showing made by Dreyfus; that is, the proposed reduced rates produce revenues which approximate variable costs, in some instances apparently failing to cover them, and in other instances slightly exceeding the variable costs of service of the connecting carrier. The revenues exceed the variable costs of the through movement. The cost study presented by Dreyfus reflects the variable costs incurred in movements to the port of Corpus Christi from only 2 of the 12 named origins. However, Frisco has not criticized the study in that regard

Both Frisco and Dreyfus contend that cost study shown by Dreyfus overstates the cost of service. Frisco claims the use of regional average costs do not accurately reflect the cost of terminal services at specific origins and destinations. Dreyfus states its costs are overstated since it did not reflect specific characteristics of the issue traffic movements, but only regional average movement characteristics. Additionally, Dreyfus points out that its costs are also inflated by its failure to reflect economies associated with multiple-car shipments outbound from the transit point. We agree with the contentions made by both parties with respect to such overstatement.

On the reopened record Dreyfus argues that a finding of common control is unnecessary in this proceeding because, if the rates are found to violate section 3(1), our order would not give the origin carrier the option of lowering or raising its rates, but would instead order cancellation of the issue rates. This protestant submits that if common control is a necessary element to establish that these rate reductions violate section 3(1), then we must compel an adjustment in the divisions. It also submits that the rates are highly remunerative on the through bases, and

that a divisions offer which denies the connecting carrier its earnings potential is not in good faith. Alternatively, should this Commission find that respondent acted in good faith in its offers of divisions, then the connecting carriers' rejections of these offers should constitute "bad faith".

District and Producers argue that a bona fide offer of divisions must be fair and equitable and that it is incumbent on respondent to demonstrate this aspect, irrespective of the length of time that the existing basis has been in effect. Frisco states that there are instances where it receives less of its proportionate share of joint revenues than an exact proportionate share of the joint costs would indicate.

Frisco acknowledges that it would appear that perhaps it receives somewhat more than its costs would justify, however, in other situations involving MoPac and Southern Pacific, Frisco receives less. Frisco argues it was not required either explicity or implicity by the order to justify its percent share of the present rates or the share it would receive from the proposed rates, and that the Commission's only purpose in entering the subject order on divisions offers was to assure itself that Frisco was not offering divisions which substantially reduced the shares of the connecting carriers. Frisco believes its evidence is clear that no substantial reductions in revenues would occur to the connecting carriers under the proposed rates as compared to those divisions which those carriers receive under the present rates and that Frisco has not predicated lower joint rates upon a divison of revenues which substantially reduces the share of the connecting carriers. Thus, Frisco criticizes the car-mile earning comparisons of District and Producers because the comparisons do not give recognition to the actual movement of the traffic. Respondent also argues that Corpus Christi is geographically disadvan-

taged because the distances between Helena and Corpus Christi and between Winfield and Corpus Christi are 260 and 250 miles, respectively, greater than between those origins and Houston. Respondent also submits that Corpus Christi could not possibly be damaged since Frisco and other rail carriers are handling to some degree traffic which has allegedly moved in motor carrier service, to other ports Frisco claims that motor carrier service has not been made available to Corpus Christi.

As to Dreyfus' assertion that Frisco is either acting in bad faith in offering divisions to MoPac which diminishes MoPac's revenues or MoPac is acting in bad faith in not accepting the offer if the offered divisions do not diminish MoPac's revenues, Frisco claims it has no explanation for MoPac's refusal to join in rates which do not reduce its revenues but which do substantially reduce Frisco's revenues.

DISCUSSION AND CONCLUSIONS

The statutory burden of proof is on the respondent carriers to demonstrate that the issue rate reductions are lawful. In order to make a finding that these reductions do not violate section 3(1) of the act, as alleged by protestants, the evidence must show that there is not a disparity in rates, that the protestants herein are not actually or potentially competitively injured, that respondent carriers are not the common source of the rates to both the preferred and prejudiced ports, or that the rate disparity, if any, is justified by the transportation conditions. See *Chicago & Eastern Illinois R. Co. v. United States,* 384 F. Supp. 298, 300-301 (N.D. Ill. 1974), affirmed 421 U.S. 956 (1975).

The evidence of record shows that there is a rate disparity of 1 to 3½ cents to the detriment of Corpus Christi and in favor of the other gulf ports. As the testimony shows, the nature of grain pricing is such that contracts to purchase wheat are affected by price considerations in fractions of a cent. This rate disparity, then, can and will adversely affect a potential buyer's ability to procure wheat for shipment to Corpus Christi. Although respondent states that other factors affect the ability to procure wheat, this statement is entitled to little weight without a factually supported statement concerning what those factors are and what effect they will have.

Frisco objects to Producers' evidence that Producers has received traffic from the origin area as inadequate because the evidence only shows that wheat has been received from terminal stations which receive shipment from the involved origins, and not what the specific origins are. The failure to reflect the origin is explained by Producers' statement that normally wheat loses its origin identity when it is unloaded at a terminal elevator. While the terminal elevators receive wheat from origins other than involved herein, the evidence still indicates that substantial amounts of wheat had been received from the involved origins. We note the absence of any testimony that the terminal elevators receive only a small portion of their traffic from those origins.

We conclude that there is sufficient evidence to demonstrate that Producers, District, and Dreyfus, have suffered an actual or potential injury.

In regard to common control, in prior cases the Commission has found that where the origin carrier proposed an equal joint rate to Corpus Christi, and made an offer of divisions of revenue to a connecting carrier to Corpus

Christi, but the connecting carrier did not concur in the joint rate, that the origin carrier was found not to have "control" over the rate to Corpus Christi. I.&S. 9132, *Wheat, Kansas and Oklahoma to Gulf Port, supra*, note 2; I.&S. 9052, *Wheat, New Mexico and Texas to Texas Ports*, 355 I.C.C. 237, (decided October 19, 1976);[5] *Corn & Soybeans Midwest to Gulf Ports*, 349 I.C.C. 1 (1974).[6] As stated, although the Commission has not previously inquired into what divisions were offered, there is concern that if an origin carrier is not required to show that it has made a good faith offer of divisions, it could always evade a finding of common control by predicating a lower joint rate upon a division of revenues which substantially reduces the share of the connecting carrier, or upon some other condition which could reasonably be expected to induce the nonconcurrence of the connecting carrier. If the connecting carrier would refuse to concur, the Commission would be left with no alternative but to find that the carrier did not have common control. Accordingly, in the order of September 7, 1977, in this proceeding the Commission announced that it would require the origin carrier to establish that it had made a good faith offer before it could claim that nonconcurrence of the connecting carrier deprived it of common control. If it appeared in light of evidence submitted that a reasaonable offer was made, then good faith would be shown.

Although protestants have argued that divisions are irrelevant to this proceeding, common control is a concept designed to insure that the carrier or carriers causing viola-

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[5]Appeal docketed *sub nom., Nueces County Navigation District No. 1* v. *Interstate Commerce Commission*, No. 76-4490, 5th Cir.

[6]Appeal docketed *sub nom., Nueces County Navigation District No. 1* v. *United States*, No. CA-3-74-1253-D, N.D. Tex.

tion of section 3(1) has the alternative to raise or lower the rates at issue, so as to restore parity. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 650 (1933). Thus, the carrier or carriers must effectively participate in both the prejudicial and preferential rates. But if two carriers refuse to act in concert to set a joint rate to a port in which they can only serve jointly, because of a genuine divisions dispute, they cannot reasonably be said to be in control of the joint rate. Our inquiry into divisions in this proceeding extends from a concern that such a dispute could be deliberately induced, as described above. If so, the carrier making the divisions offer should not be able to claim that it lacks common control. No. 36491, *Wheat, Oklahoma and Kansas to Texas Gulf Ports*, sheet 11, (decided October 20, 1977).

The evidence submitted in regard to the present and proposed divisions amply demonstrates that the change in revenues to be received by the connecting carriers under the reduced rates is not substantial. The changes observed in revenues are for the most part, in fractions of 1 cent; as a consequence, the change in operating ratios are only 1 or 2 percent.

We are concerned that the operating ratios are below variable costs or only marginally above variable costs. Frisco contends that our order is limited to whether the reductions in offers of divisions are substantial and not as to the absolute values of the offers. We must emphasize that we have elicited the offers of divisions with a view to determining whether the origin carrier made a good faith offer. Further, we are in agreement with the parties that the construction of a divisional scale is not solely a matter of costs and mathematics but reflects many considerations. The evidence herein indicates that the proffer of divisions, if accepted, would result in revenues which are

very close to variable costs, sometimes slightly above and sometimes slightly below variable costs. Because of the lack of precision of the cost evidence (the parties agree that the costs are somewhat overstated) the revenues could most accurately be described as marginally compensatory.

The evidence on this record shows that the respondent did not attempt to induce deliberately the nonconcurrence of its connecting carriers. It offered divisions of revenue premised upon the same basis as the existing divisions, which the connecting carriers had previously accepted. The tender, if accepted, would have produced no reduction in the connecting carriers' percentage share of the revenues from the through movement and, at most, only a small reduction in the absolute revenues received by the connecting carriers. We note that in some instances there would be no change in the revenues received by the MoPac.

This is not to say that a tender of the same divisions by an origin carrier will necessarily result in a finding that it has made a good faith tender of divisions. Changed circumstances may render a previously reasonable divisions tender not only unacceptable to the connecting carrier but also so clearly unacceptable that its tender can be viewed as reflecting something less than good faith on the part of the originating carrier. The marginal profitability of the existing divisions to the connecting carriers means that a tender of the existing divisions under any changed circumstances merits careful examination. However, the change here is not so great, nor are the resulting divisions so obviously noncompensatory that we can conclude that the respondent offered them in an attempt to induce nonconcurrence by the connecting carriers.

In view of the record herein, we believe that respondent

has sustained its burden of proof that the offers of divisions were made in good faith, and that respondent has no common control over the rates. Under the circumstances, we need not reach the issue of the similarity of transportation conditions characteristic of the movements in issue.

In view of the above, we conclude that the issue schedules do not violate section 3(1) of the act.

District and Producers have argued that the reduced rates violate section 1(4) of the act apparently under the theory that through routes and just and reasonable rates are no longer in effect. We do not agree. The evidence of record, including cost evidence relating to the through movements, amply demonstrates that the present and proposed rates are just and reasonable. Further, outside of the allegation that the proposed schedules violate section 1(4), there is no evidence which would indicate that the parties would be unable to move the issue traffic from the origins to Corpus Christi. For these reasons, we find that the rates have been shown to be just and reasonable and not in violation of section 1 of the act.

We find that the assailed rates are not unduly prejudicial to Corpus Christi and unduly preferential of Galveston, Houston, Texas City, Beaumont, and Port Arthur.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER MURPHY, dissenting:

Respondent Frisco's evidence fails to convince me that it did, in fact, enter into serious negotiations over divisions

with the Missouri Pacific and the Southern Pacific on export grain to Corpus Christi. Actually, the evidence conclusively shows that the Frisco seeks, as an afterthought, to justify its initial purported offer to the two carriers. The majority's approval of such a device raises serious questions of due process, among other defects.

My position with regard to the exclusion of Corpus Christi in reduced rates on export grain has been noted in a number of proceedings and needs no further elaboration.[7] Succinctly stated, such proposals are in violation of the Gulf port equalization orders. See also, Public Law 94-210, section 202(f).

Today's decision leaves shippers and other interests at Corpus Christi in an unenviable position. They are left with virtually no remedy to counter the prejudicial treatment of the Frisco although the act was specifically designed to preclude such prejudicial treatment. Obviously, in the face of the majority's decision today, protestants must look to other forums for relief.

I respectfully dissent.

COMMISSIONER STAFFORD, dissenting:

I have previously noted my opposition to any requirement that the publishing carrier make a showing of a good faith offer to establish a joint rate.

In this proceeding, the majority found that a good faith offer was made primarily because it was based on one same percentage division as currently exists. I am con-

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[7]See, for example, *Corn & Soybeans Midwest to Gulf Ports*, 349 I.C.C. 1, 6-8 and No. 36491, *Wheat, Oklahoma and Kansas to Texas Gulf Ports*, 357 I.C.C. 352 (1977).

cerned, however, that future cases may not be as clear cut. The result will be that the parties will have to introduce the same type and quantum of evidence as they would in any ordinary divisions proceeding.

Unless the Commission is willing to formulate extensive guidelines about good faith offers and reasonable divisions, we should not be getting involved here. Anyone who has followed the Commission through the years knows that divisions cases are the most difficult we have, and involve many imprecise, vague and obscure issues of law and accounting. Every time we tangle with divisions matters, we learn that this subject is best left to arm's length bargaining among the carriers.

COMMISSIONER GRESHAM, dissenting:

I believe that the subject schedules must either be canceled or extended to Corpus Christi. I cannot agree with the basis of the order, whether Frisco has failed to satisfy its burden of proof as to a good faith offer to divisions to its connecting carriers. Common control would exist to these gulf ports even if good faith were established. See *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 655-70 (1933) (Stone, J., dissenting).

See also *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co.*, 253 I.C.C. 745, 749 (1942); *Port of New York Authority* v. *Baltimore & O. R. Co.*, 248 I.C.C. 165, 182 (1941); *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, 172 (1936).

I have previously expressed my position in a number of proceedings, including *Corn & Soybeans Midwest to Gulf Ports*, 349 I.C.C. 1, 6-8 (1974); *Corn & Soybeans Midwest to Gulf Ports, For Export*, 339 I.C.C. 595, 626 (1971); *Wheat and Grain Sorghums, Midwest to Texas Ports*, 337

I.C.C. 777, 782 (1970); and *Soybeans, Midwest to Chicago & Gulf Ports, Export,* 335 I.C.C. 883, 893 (1970).

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

(Seal)

H.G. Homme, Jr.,
Acting Secretary.

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APPENDIX A

Statement showing MP divisions of rates south of Fort Worth, Tex., on export shipments of wheat, and comparison of MP share of present and proposed rates in cents

From	To	MP percent revenue[1]	Present[2]			Proposed[2]			Reduction to MP on proposed vs. present rates
			Rate	MP proportion (col. C x col. D)	MP minimum revenue[3]	Rate	MP proportion (col. C x col. H)	MP minimum revenue[3]	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Oklahoma	*Texas*								
Guthry	Houston	20.3	68.5	13.9	18.4	66.5	13.5	18.4	[4]NC
Do	Corpus Christi	32	68.5	21.9	23.3	66.5	21.3	23.3	NC
Helena	Houston	20.3	67.5	13.9	18.4	67.5	13.7	18.4	NC
Do	Corpus Christi	32	68.5	21.9	23.3	67.5	21.6	23.3	NC
Kansas									
Winfield	Houston	19.9	80.5	16.0	18.4	79.5	15.8	18.4	NC
Do	Corpus Christi	31.4	80.5	25.3	23.3	79.5	25.0	23.3	-0.3
Arkansas City	Houston	19.9	80.5	16.0	18.4	78.5	15.6	18.4	NC
Do	Corpus Christi	31.4	80.5	25.3	23.3	78.5	24.6	23.3	-0.7
Oklahoma									
Middleton	Houston	20.3	73.5	14.9	18.4	72.5	14.7	18.4	NC
Do	Corpus Christi	32	73.5	23.5	23.3	72.5	23.2	23.3	-0.2
Bender	Houston	20.3	73.5	14.9	18.4	72.5	14.7	18.4	NC
Do	Corpus Christi	32	73.5	23.5	23.3	72.5	23.2	23.3	-0.2

See footnotes at end of table.

Statement showing MP divisions of rates south of Fort Worth, Tex., on export shipments of wheat, and comparison of MP share of present and proposed rates in cents—Continued

From	To	MP percent revenue[1]	Present[1]			Proposed[1]			Reduction to MP on proposed vs. present rates
			Rate	MP proportion (col. C x col. D)	MP minimum revenue[2]	Rate	MP proportion (col. C x col. H)	MP minimum revenue[2]	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Oklahoma	*Texas*								
Peckham	Houston	20.3	73.5	14.9	18.4	71	14.4	18.4	NC
Do	Corpus Christi	32	73.5	23.5	23.3	71	22.7	23.3	-0.2
Graieville	Houston	20.3	73.5	14.9	18.4	71	14.4	18.4	NC
Do	Corpus Christi	32	73.5	23.5	23.3	71	22.7	23.3	-0.2
Blackwell	Houston	20.3	72	14.6	18.4	69.5	14.1	18.4	NC
Do	Corpus Christi	32	72	23.0	23.3	69.5	22.2	23.3	NC
Eddy	Houston	20.3	72	14.6	18.4	68.5	13.9	18.4	NC
Do	Corpus Christi	32	72	23.0	23.3	68.5	21.9	23.3	NC
Lamont	Houston	20.3	70	14.2	18.4	67.5	13.7	18.4	NC
Do	Corpus Christi	32	70	22.4	23.3	67.5	21.6	23.3	NC
Salt Fork	Houston	20.3	70	14.2	18.4	67.5	13.7	18.4	NC
Do	Corpus Christi	32	70	22.4	23.3	67.5	21.6	23.3	NC

[1]Rates stated in columns D through J are in cents per hundred pounds at Ex Parte No. 336 level.
[2]Provided for in SLSF D/B 163-Grain-2, MoPac D/D No. 14249.
[3]No change.

Statement showing SLSF division of rates on export shipment of wheat when routed in connection with MP from Fort Worth and comparison of SLSF share of present and proposed rates in cents

From	To	SLSF percent revenue[2]	Present[1]			Proposed[1]			[3]Reduction to SLSF proposed vs. present rates
			Rate	SLSF proportion (col. C x col. D)	SLSF actual revenue[2]	Rate	SLSF proportion (col. C x col. G)	SLSF actual revenue[2]	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Oklahoma	*Texas*								
Goltry	Houston	79.7	68.5	54.6	50.1	66.5	53.0	48.1	-2.0
Do	Corpus Christi	68	68.5	46.6	45.2	66.5	45.2	43.2	-2.0
Helena	Houston	79.7	68.5	54.6	50.1	67.5	53.8	49.1	-1.0
Do	Corpus Christi	68	68.5	46.6	45.2	67.5	45.9	44.2	-1.0
Kansas									
Winfield	Houston	80.1	80.5	64.5	62.1	79.5	63.7	61.1	-1.0
Do	Corpus Christi	68.6	80.5	55.2	55.2	79.5	54.5	54.5	-0.7
Arkansas City	Houston	80.1	80.5	55.2	62.1	78.5	62.9	60.1	-2.0
Do	Corpus Christi	68.6	80.5	55	55.2	78.5	53.9	53.9	-1.3
Oklahoma									
Middleton	Houston	79.7	73.5	58.6	55.1	72.5	57.8	58.1	-1.0
Do	Corpus Christi	68	73.5	50.0	50.0	72.5	49.3	49.2	-0.8
Bender	Houston	79.7	73.5	58.6	55.1	72.5	57.8	54.1	-1.0
Do	Corpus Christi	68	73.5	50.0	50.0	72.5	49.3	49.2	-0.8

See footnotes at end of table.

Statement showing SLSF division of rates on export shipment of wheat when routed in connection with MP from Fort Worth and comparison of SLSF share of present and proposed rates in cents—Continued

From	To	SLSF percent revenue[2]	Present[1]			Proposed[1]			Reduction to SLSF proposed vs. present rates
			Rate	SLSF proportion (col. C x col. D)	SLSF actual revenue[2]	Rate	SLSF proportion (col. C x col. G)	SLSF actual revenue[2]	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Oklahoma	*Texas*								
Peckham	Houston	79.7	73.5	58.6	55.1	71	56.6	52.6	-2.5
Do	Corpus Christi	68	73.5	50.0	50.0	71	48.3	47.7	-2.3
Grainville	Houston	79.7	73.5	58.6	55.1	71	56.6	52.6	-2.5
Do	Corpus Christi	68	73.5	50.0	50.0	71	48.3	47.7	-2.3
Blackwell	Houston	79.7	72	57.4	53.6	69.5	55.4	51.1	-2.5
Do	Corpus Christi	68	72	49.0	48.7	69.5	47.3	46.2	-2.5
Eddy	Houston	79.7	72	57.4	53.6	68.5	54.6	50.1	-3.5
Do	Corpus Christi	68	72	49.0	48.7	68.5	46.6	45.2	-3.5
Lamont	Houston	79.7	70	55.8	51.6	67.5	53.8	49.1	-2.5
Do	Corpus Christi	68	70	47.6	46.7	67.5	45.9	44.2	-2.5
Salt Fork	Houston	79.7	70	55.8	51.6	67.5	53.8	49.1	-2.5
Do	Corpus Christi	68	70	47.6	46.7	67.5	45.9	44.2	-2.5

[1]Rates stated in columns D through J in cents per hundred pounds at Ex Parte No. 336 level.
[2]Provided for in SLSF D/B 1683-Grain-2. MoPac D/B No. 14249, MoPac receives a minimum of 23.3 cents per cwt. south of Fort Worth.

APPENDIX B

Statement showing SP divisions of rates south of Fort Worth or Dallas, Tex., on export shipments of wheat, and comparison of SP share of present and proposed rate in cents

From	To	SP percent[2]	Present[1]		Proposed[1]		Reduction to SP on proposed vs. present rates
			Rate	SP proportion (col. C x col. D)	Rate	SP proportion (col. C x col. F)	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
Oklahoma	*Texas*						
Goltry	Corpus Christi	32	68.5	21.9	66.5	21.3	0.6
Helena	do	32	68.5	21.9	67.5	21.6	0.3
Kansas							
Winfield	do	31	80.5	25.0	79.5	24.6	0.4
Arkansas City	do	31	80.5	25.0	78.5	24.3	0.7
Oklahoma							
Middleton	do	32	73.5	23.5	72.5	23.2	0.3
Bender	do	32	73.5	23.5	72.5	23.2	0.3
Peckham	do	32	73.5	23.5	71	22.7	0.8
Grainville	do	32	73.5	23.5	71	22.7	0.8
Blackwell	do	32	72	23.0	69.5	22.2	0.8
Eddy	do	32	72	23.0	68.5	21.9	1.1
Lamont	do	32	70	22.4	67.5	21.6	0.8
Salt Fork	do	32	70	22.4	67.5	21.6	0.8

[1]Rates stated in columns D through H in cents per hundred pounds at Ex Parte No. 336 level.
[2]Provided for in SLSF D/B 1724-Grain-6, SP D/B 1999.

Statement showing SLSF divisions of rates on export shipments of wheat, when routed in connection SP from Fort Worth or Dallas, Tex., and comparison of SLSF share of present and proposed rates in cents

From	To	SLSF percent[2]	Present[1]		Proposed[1]		Reduction to SLSF proposed vs. present rates
			Rate	SLSF proportion	Rate	SLSF proportion	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
Oklahoma	***Texas***						
Goltry	Corpus Christi	68	68.5	46.6	66.5	45.2	1.4
Helena	do	68	68.5	46.6	67.5	45.9	0.7
Kansas							
Winfield	do	69	80.5	55.5	79.5	54.9	0.6
Arkansas City	do	69	80.5	55.5	78.5	54.2	1.3
Oklahoma							
Middleton	do	68	73.5	50.0	72.5	49.3	0.7
Bender	do	68	73.5	50.0	72.5	49.3	0.7
Peckham	do	68	73.5	50.0	71	48.3	1.7
Grainville	do	68	73.5	50.0	71	48.3	1.7
Blackwell	do	68	72	49.0	69.5	47.3	1.7
Eddy	do	68	72	49.0	68.5	46.6	2.4
Lamont	do	68	70	47.6	67.5	45.9	1.7
Salt Fork	do	68	70	47.6	67.5	45.9	1.7

[1]Rates stated in columns D through H are in cents per hundred pounds at Ex Parte No. 336 level.
[2]Provided for in SLSF D/B 1724-Grain-6, SP D/B 1999.

APPENDIX C

No. 36491 (SUB-NO. 1)

WHEAT, OKLAHOMA AND KANSAS TO TEXAS GULF PORTS

Decided February 2, 1979

Alternative order cannot be issued when origin carrier, which directly serves preferred ports but only indirectly serves a prejudiced port, is not in actual control of rates to the prejudiced port. Actual control determined by surrounding circumstances, including good faith offers of divisions. Prescribed rates found not to be appropriate, justified both on the bases of policy considerations and on the record. Proceeding discontinued.

Donald E. Engle, Hugh L. McCully, Donald E. Ransom, and Donal L. Turkal for respondents.

Frank C. Brooks, Andrew P. Goldstein, Raymond R. Nolen, and M.H. Swanson for protestants.

DECISION

SUMMARY

The central issues in this proceeding are: (1) whether the reduced carload rates on wheat which are afforded to various Texas gulf ports but not to Corpus Christi, TX, are unduly preferential to these various Texas gulf ports and prejudicial to Corpus Christi in violation of 49 U.S.C. 10741(b) (formerly section 3(1) of the Interstate Com-

merce Act (act)),[1] and (2) whether the reduced rates violate outstanding orders in *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 291 I.C.C. 459 (1954), and *Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co.*, 315 I.C.C. 155 (1961) (the *Corpus Christi* cases).

A distinction must be made between preference and prejudice and *undue* preference and prejudice. As a general rule, not all preferences to one locality and prejudice to another are considered undue and thus unlawful. In order to find undue and unlawful preference and prejudice, the following elements must exist. (1) There must be a rate disparity. (2) There must be actual or potential injury. (3) A similarity of transportation conditions must exist to both the preferred and prejudiced points. Finally, in order to provide a remedy with an alternative order, the carrier or carriers must control the rates to both the preferred and prejudiced points. *Texas & Pacific Ry. Co. v. U.S.*, 289 U.S. 627 (1933). An alternative order is one which allows the carrier or carriers to adjust the rates by raising the preferred rate, or lowering the prejudicial rate or altering both to remove the unlawfulness.

Our determination of the issues in this proceeding hinges on the fourth element; that is, whether there is common control of the rates to both the preferred and prejudiced ports. (The other three elements are also discussed in this decision.) Without this fourth element, an alternative order cannot be issued under section 10741.

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[1]The Interstate Commerce Act was revised and codified without substantive change on October 17, 1978, at 49 U.S.C. 10101 *et seq.* Under the revised code. 49 U.S.C. 10741 prohibits "unreasonable discrimination," a term replacing "undue preference and prejudice" of section 3(1) in the former act. In order to be consistent with the prior report, and because there is no substantive change in the new code. we will continue to use the terms "preference" and "prejudice."

Respondent, St. Louis-San Francisco Railway Co. (Frisco), which does not serve Corpus Christi directly, did not publish the reduced rates to that port because it could not obtain concurrences from the two connecting carriers which serve Corpus Christi. The two connecting carriers, Missouri Pacific Railroad Company (MoPac) and Southern Pacific Transportation Company (SP), were also made respondents in this proceeding. We found in the prior decision that the reduced rates violate neither section 3(1) of the act (49 U.S.C. 10741) nor our outstanding *Corpus Christi* orders. These findings were based upon our conclusion that Frisco does not possess common control over the rates to both the preferred and prejudiced ports.

Protestants Louis Dreyfus Corporation (Dreyfus) and Nueces County Navigation District No. 1 and Producers Grain Corporation (collectively District) present the following basic arguments. First, a finding of control is unnecessary to issue an alternative order under section 10741. Second, if common control is a necessary element to issue an alternative order, then Frisco commonly controls the rates both to the preferred ports and to the prejudiced port of Corpus Christi, thus allowing the issuance of an alternative order. Third, a finding of common control is an unnecessary element to prescribe rates. Fourth, the publication of the reduced rates to ports other than Corpus Christi is within the scope of the outstanding *Corpus Christi* order.

After careful consideration of these arguments, we conclude first, that common control of the rates to both the preferred and prejudiced ports remains a necessary element for issuing an alternative order. Second, in our opinion Frisco does not control the rates to Corpus Christi. Therefore, we cannot issue an alternative order. Third, not only does this record fail to afford a basis for rate

prescriptions, but also considerations of carrier rate flexibility would preclude our prescribing rates in any event. Finally, the *Corpus Christi* cases will be reopened to determine whether those decisions are consistent with the action taken in this case.

BACKGROUND

In the prior report served December 19, 1977, reduced carload commodity export rates on wheat from points in Oklahoma and Kansas to the Texas ports of Beaumont, Galveston, Houston, Port Arthur, and Texas City, but not Corpus Christi, were found not unduly preferential or prejudicial or otherwise unlawful. Petitions for administrative review were filed January 9, 1978, by protestants Dreyfus and by District.[2] On the same date, Cook Industries (Cook) filed a petition for leave to intervene and a petition for administrative review. Respondents replied.

We reopened this proceeding on the present record by our order of June 20, 1978, subject to court approval, to reconsider the highly important and unusual issues raised both in this case and in other cases discussed below. Cook's petition to intervene was granted in the same order. The facts are accurately stated in the prior report and are repeated here only to the extent necessary for an understanding of the issues.

Subsequent to our prior decision, Frisco received a concurrence from one of the connecting carriers, MoPac.

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[2]Because our prior full Commission decision was administratively final, District filed a court appeal in *Nueces County Navigation District No. 1 and Producers Grain Corporation v. Interstate Commerce Commission and United States of America*, 5th Cir. No. 78-1348.

Consequently, rates equivalent to those in effect on Frisco's lines to the other Texas gulf ports became effective February 22, 1978, to Corpus Christi.

By letter filed January 27, 1978, Frisco requested that this proceeding be discontinued. SP and protestant Dreyfus agreed that this proceeding should be discontinued. Dreyfus, however, also requested that the decision be vacated.

The filing of equal rates to Corpus Christi could be considered to moot the case by removing the alleged prejudice to that port. In the recent series of cases dealing with port equalization policy for the Texas gulf ports, similar concurrences have also been filed, technically mooting those cases. *E.g.*, I. and S. No. 8576, *Corn & Soybeans Midwest to Gulf Ports, for Export*, 349 I.C.C. 1 (1974), pending on review in *Nueces County Navigation District, et al. v. United States, et al.*, N.D. Tex., No. CA-3-74-1253D; I. and S. No. 9052, *Wheat, New Mexico and Texas to Texas Ports*, 355 I.C.C. 237 (1976), petition for review dismissed as moot in *Nueces County Navigation District No. 1, et al. v. ICC, et al.*, 5th Cir., No. 76-4490; I. and S. No. 9132, *Wheat, Kansas and Oklahoma to Texas Gulf Ports*; petition for review dismissed as moot in *Producers Grain Corp., et al. v. ICC, et al.*, 5th Cir., No. 77-1788; and this proceeding.[3] Although each of the above cases has been vacated (with the exception of this proceeding), we are readopting the reasoning of I. and S. No. 8576, I. and S. No. 9052, and I. and S. No. 9132 to the extent they do not conflict with the decision herein.

[3]We wish to emphasize that port equalization is currently under study by the Commission. This study by the Rail Service Planning Office had examined precedent cases, rate relationships, traffic flow, and carrier and port operating practices; a final report was issued January 1979. Following study of that report, the Commission will again examine the issue of port relationships.

These cases appear to fall within the scope of *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), in that the legal questions are "continuing" and "capable of repetition, yet evading review." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974). Because we do not wish to thwart judicial review on grounds of mootness, we expressly refused in our order of June 20, 1978, to grant Dreyfus' petition for vacation of our decision in this proceeding.

In the prior decision, we found rate disparities, injury, and similarity of transportation circumstances. Nevertheless, we concluded that the crucial element of common control was not present based on the application of the "good faith" test.[4] and that, without common control, the rates cannot be found to violate section 10741.

The carriers' argument that transportation conditions to Corpus Christi vary from those of the other ports was not adopted in the prior decision. The transportation conditions are not shown to have changed significantly from those that existed when the Corpus Christi equalization orders were entered in 1954 and 1961 and thus do not prevent a finding of a section 10741 violation herein. However, the establishment of the defense of different transportation conditions is not essential to respondents' case in view of the finding of lack of common control.

In discussing this proceeding, it is helpful to look at cases which have preceeded it, including the *Corpus Christi* cases on which protestants rely. In the *Corpus Christi* cases, the Commission concluded that the MoPac

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[4]The facts relevant to "good faith" test were discussed at length in our prior decision of December 19, 1977. Briefly, the divisions offered in connection with the reduced rates were not such as to compel nonacceptance.

and the Texas and New Orleans (now part of Southern Pacific), together with other carriers which served the Texas ports, acting in conjunction with the originating lines in the origin territory, directly and effectively controlled the rates to (as pertinent herein) the preferred ports (Galveston, Houston, and Port Arthur) and the prejudiced port (Corpus Christi). Under such circumstances the carriers act as a network in controlling the rates to both the preferred and prejudiced ports. Factors in determining a network are discussed later in this decision.

The *1961 Corpus Christi* decision upheld the 1954 decision in regard to common control and found it still to exist. In both the 1954 and the 1961 cases, which relied on the theory of network common control, the carriers were directed to remove the undue prejudice found to exist to Corpus Christi. These orders are still in effect.

More recent rate reductions accorded to various Texas ports but not Corpus Christi have resulted in decisions where, on the facts presented, we concluded that the carrier proposing the reduction did not have common control over the rates to the preferred and prejudiced ports.

The first of these cases was *Soybeans, Midwest to Chicago & Gulf Ports, Export,* 335 I.C.C. 883 (1970). As relevant to this case, the Commission there found the proposed reduced rates on soybeans just and reasonable and otherwise lawful and not in violation of the outstanding orders providing for equal treatment of Corpus Christi. The Chicago, Rock Island and Pacific Railway Company (Rock Island) and Kansas City Southern Railway Company had sought approval for reduced rates from the rate bureau membership but received a negative vote. The rates were then published individually by the two carriers. Because neither carrier reached Corpus Christi, each of-

fered to join in the reduced rates with the connecting carriers which served Corpus Christi (MoPac and SP). Because the destination carriers did not accept, there was not the joint participation in rate action which there had been in the *1954 Corpus Christi* cases. In the absence of such carrier interaction, we refused to find common control. While the matter was pending on judicial review, the carriers established equivalent joint rates to Corpus Christi, thereby mooting the case. Nevertheless, the court reviewed the Commission's decision, disagreed with it, and reversed the case. While that adverse judgment was pending on appeal in the Supreme Court, the Commission vacated its decision. The Supreme Court then remanded the case to the district court with directions to dismiss the case as moot.[5]

In a subsequent rate reduction, Rock Island proposed reduced multiple-car rates on corn and soybeans over its lines from the Midwest to Galveston, Houston, and Texas City but not to Corpus Christi; the connecting carriers again failed to concur. *Corn & Soybeans Midwest to Gulf Ports, for Export,* 339 I.C.C. 595, modified at 349 I.C.C. 1 (1974). At 349 I.C.C. 4, we stated that if one railroad serve one port directly and serves the other by joint service with a second railroad, section 3(1) (section 10741) does not give this Commission the power to require equalized rates in the event that the second railroad refuses to participate in equalized joint rates.[6]

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[5]*Chicago, R. I. & Pacific R.R. v. Nueces County Navigation District,* 415 U.S. 953 (1974).

[6]E.g., I. and S. No. 9052. *Wheat, New Mexico and Texas to Texas Ports, supra;* and I. and S. No. 9132. *Wheat, Kansas and Oklahoma to Texas Gulf Ports, supra.*

Subsequent cases have posed the issue of common control under similar circumstances.[7] We conclude that common control was present in those cases. We based our findings on more detailed knowledge of the circumstances relating to the offers and refusals of division arrangements.

Alternative Orders and Common Control

Unless common control exists, no alternative order can be issued under section 3(1) to remedy undue preference and prejudice. In *Texas & Pacific Ry. Co., supra,* the Supreme Court held that, to be subject to an order under section 3(1) (49 U.S.C. 10741), a carrier or group of carriers must be the common source of the discrimination, effectively participate in both the preferential and prejudicial rates, and be in such a situation that they have an actual alternative to raise one rate, lower the other, or alter both. The carriers do not have such an alternative unless they control the rates to both the preferred and prejudiced points. *Texas & Pacific, supra,* at 650.

Protestants argue that *Ayrshire Corp. v. United States,* 335 U.S. 573 (1949), explicitly modified, and partially overruled the court's prior decision in the *Texas & Pacific* case. In *Ayrshire,* the court concluded that while the rates violated section 3(1) (section 10741), common control was not a necessary element when a section 15(1) order (now 49 U.S.C. 10704) prescribing rates is issued. The court had previously stated in *Texas & Pacific* that minimum/maximum rate orders issued pursuant to section 15(1) (section

[7] I. and S. No. 9169, *Corn, Wheat or Grain Sorghums, to Texas Ports,* 359 I.C.C. 132 (1978); *Wheat, Oklahoma and Kansas to Texas Gulf Ports,* 357 I.C.C. 352 (1977).

10704) would not require the options of an alternative order. *Texas & Pacific, supra,* at page 650, footnote 39. The court again pointed this out in *Ayrshire* at pages 593-594:

> This is not a case like *Texas & Pacific R. Co. v. United States, supra,* where the Commission issues a so-called alternative order directing the carriers to remove an unjust discrimination or undue preference which has been found. That kind of order leaves a choice to the carriers whether to eliminate the unlawful practice by raising one rate, lowering the other, or altering both. But as we recently held in *New York v. United States, supra,* at 342, the rule is not applicable where the Commission itself undertakes to correct the unlawful practice by prescribing the just and reasonable rate. The Commission has taken that action here. As we noted above, the present proceeding was one under § 15(1) and § 15(7). Section 15(1) gives the Commission power to determine and prescribe the just and reasonable rate once it finds, *inter alia,* that any rate charged is unjustly discriminating or unduly preferential or prejudicial. The Commission in the present case has exercised that power. It has prescribed approved rates. They are rates which in the Commission's judgment will eliminate the unjust discrimination and undue preference found to exist in this rate structure. Hence the question whether Milwaukee effectively controlled the higher joint-line rates is irrelevant here. *New York v. United States, supra.*

District argues that *New York v. United States,* 331 U.S. 284 (1947), and a 1940 amendment to section 3(1) (section 10741) overturned the decision in *Texas & Pacific* and thus eliminated the need for a finding of common

control. We do not agree. The 1940 amendment extended the prohibition against discrimination to regions, districts, and territories, *New York, supra,* pp. 296-97. As the court stated in *New York,* at page 300, "In other words, Congress did not introduce a new standard of discrimination by its amendment to section 3(1); it merely made clear its purpose that regions, districts, and territories should be the beneficiaries of the law against discrimination." Although this statement was made in the context that the Commission must take into account the transportation conditions in deciding whether there is discrimination between territories, it appears equally applicable here, especially in view of the court's statements in *New York.* There the court distinguished *Texas & Pacific* on the ground that the principle there announced "is applicable only where the Commission is directing the carriers to remove the discrimination" but not "where, as here, the Commission in order to eliminate territorial discriminations proceeds under § 15(1) to fix new reasonable rates." 331 U.S. at 342. Accordingly, a finding of common control is still necessary to issue an alternative order.

Prescribed Rates and Common Control

Protestants argue that prescribed rates could be ordered without a finding of common control. This argument is based on the fact that the first three elements of a section 10741 violation have been established (rate disparties, injury, and transportation conditions). They argue that since the fourth element of common control is needed only to establish a basis for an alternative order, a finding of common control is unnecessary for an order prescribing rates. The *New York* case decided that this Commission has authority to prescribe rates without a finding of common control to remedy territorial discriminations. *New*

York, supra, pp. 340-343. It is unclear from that case as to whether the court would have reached the same conclusion if the issues had been limited to section 3(1) (section 10741). The court in *Ayrshire,* citing *New York,* stated, however, that the Commission can remove undue preference and prejudice by prescribing rates, even though the rates under consideration were within the zone of reasonableness.[8] *Ayrshire, supra,* p. 594.

We believe prescribed rates under section 15(1) are not warranted because of the nature of the traffic and the flexibility needed to adjust rates as competitive conditions require.[9] It is well recognized that trucks are not regulated when hauling agricultural products, and water carriers are not regulated when carrying commodities in bulk, the manner in which most grain is transported. These carriers have the flexibility to adjust rates as economic and transportation conditions require. By comparison, prescribed rates would leave the rail carriers with little or no flexibility. Prescribed rates could result in charges which become too high in times of rapidly changing transportation and economic conditions. High rates as a result of rate prescriptions could prevent or restrict the

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[8]As discussed in the prior report, the reduced rates are clearly within the zone of reasonableness. Protestants have argued both explicitly and implicitly that the issue is not that their rates are too high, but that identical rates are not afforded to both Corpus Christi and the other Texas ports.

[9]A rate is prescribed under a section 10704 order. This order remains in effect unless modified. To modify a prescribed rate a carrier must first petition for permission to change the rate level. This petition is subject to opposition, reopening of the administrative proceeding and possible court appeal. See *Atchison, T. & S.F. Ry. Co. v. United States,* 284 U.S. 248 (1932). If the permission to change the rate is granted, the carrier may then publish the change. However, this rate change still remains subject to possible investigation and suspension in a subsequent proceeding.

farmers' ability to market farm products and could unjustifiably cause increases in consumer prices. The carriers themselves would lose revenues if a higher level of rates prevented traffic from moving. On the other hand, prescribed rate might eventually result in noncompensatory revenues to the carriers because of rapid inflation.

Further, the record in this proceeding is not sufficiently comprehensive to permit a rate prescription. There is no evidence as to what effects prescribed rates would have on the grain rate structure. Past rate prescriptions have been in relationship to existing commodity rate structures. *E.g., Ayrshire Corp. v. United States, supra; Youngstown Co. v. United States,* 295 U.S. 476 (1935), and *Franklin Limestone Co., Inc., v. Alabama G.S.R. Co.,* 264 I.C.C. 753 (1946). Here protestants have the burden of establishing a record sufficient for rate prescriptions,[10] including evidence describing the regional grain rate structure, the effects of prescribed rates for one carrier on this structure, and sufficient economic justification as to why prescribed rates should take precedence over carrier flex-

[10]The prior decision incorrectly implies that the burden of proof is on the respondent carriers in regard to section 3(1) (section 10741). A carrier's burden of proof under a section 15(8) investigation relates to the justness and reasonableness of the proposal. 49 U.S.C. section 10707. A respondent carrier does not initially have the burden of proof in respect to section 3(1) issues, except in regard to transportation conditions. *Lake Cargo Coal, Ky., Va., and W. Va. to Ashtabula Harbor,* 326 I.C.C. 63, 69 (1965). 329 I.C.C. 549, 553 (1967). Protestants have the burden in justifying prescribed rates. We note that under the Administrative Procedure Act (5 U.S.C. 556), the proponent of an order has the burden of proof unless otherwise provided by statute. Cf. *Lake Cargo Coal, Ky., Va., to Ashtabula Harbor, supra.* This result is also dictated by logic. If the burden of proof were on a carrier to show that prescribed rates were not justified, this would place an untenable burden on a carrier's right to set its own rates in the first instance.

ibility. Protestants have not met this burden. We, therefore, will not prescribe rates under these circumstances.

ALTERNATIVE ORDER

We now turn from the issue of whether rates should be prescribed to the issue of whether an alternative order can be issued under section 10704. The factual question is whether Frisco exercises actual control over the rates in such a manner that an alternative order can be issued. In *Texas & Pacific* the court stated that a carrier must be the common source of the rates to both the preferred and prejudiced points before we may issue an alternative order. The court stated at 289 U.S. 649:

> Where, however, a carrier whose lines reach, or which controls the rate to, one of the destinations, is a party to a joint rate to the other but cannot make or control the latter rate, or though it were to withdraw as a party thereto, or to cancel the rate, the discrimination would still continue — it cannot be held responsible, nor can any order to remove the prejudice run against it. [Footnote omitted.]

At 289 U.S. 650-51, the court quoted with approval from *Central Railroad of New Jersey v. United States*, 257 U.S. 247:

> In the *Central Railroad* case it was said (p. 259): But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination *only if each carrier has participated in some way in that which caused the unjust discrimination;* as where a lower joint rate is given to one locality than to another similarly

> situated. (Citing cases.) If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers***. What Congress sought to prevent by that section [3], as originally enacted, was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carrier. [Emphasis added.]

If Frisco does not effectively participate "in some way in that which causes the unjust discrimination," then it cannot have common control. *Ibid.*

In the simplest case, one carrier serving both points would clearly have common control. Similarly, if two or more carriers serve both points between them and are acting in concert, they would also have common control. The difficult factual questions arise as to whether the carriers are acting in concert when the origin carrier must serve one of the ports by a connecting carrier (which cannot serve the issue origins) and the connecting carriers do not concur in the origin carrier's changed rates.

Prior orders equalizing rates to Corpus Christi and other Texas ports were entered on the basis of our powers under section 3(1) (section 10741). We have the authority under section 10741 to remedy unreasonable discrimination between ports by a single carrier or a group of carriers acting in concert. If, for example, the origin carrier serves both the Galveston and Corpus Christi ports, we may require the carrier (under appropriate circumstances) to publish equivalent rates to both ports. Further, if two railroads jointly serve these two ports, they cannot publish rates favoring one port. We do not have the authority under section 10741 to equalize rates between two ports if each port is served by only one of two carriers and the two carriers do not act in concert.

In *Albany Port District Comm. v. Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, 172 (1936), the Commission found that a massive differential rate adjustment covering ports in the north Atlantic region demonstrated that the railroads serving those ports had acted in concert.[11] While none of the carriers served all the ports directly, as a group they had control of the rates to all the ports at issue.

In *Beaumont, Tex., Port Comm. v. Abilene & S. Ry. Co.*, 253 I.C.C. 127, 132-33 (1942), we found a network of rail systems because of the railroad's many points of intersection and because each of the carriers participated in joint rates to each of the ports and inland points covered by the complaint. A situation similar to the *Beaumont* case was found in the *1961 Corpus Christi* case. 315 I.C.C. at 162. While the *1954 Corpus Christi* order dealt with a broader origin area, the Commission again found that a network controlled the rates to the preferred and prejudiced ports. 291 I.C.C. at 470.

In the Corpus Christi cases, the Commission presumed that because of the interrelated nature of the rail network, common control existed. We do not believe that this

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[11]Thus the amount of a port rate between Baltimore and a point in Michigan is primarily determined, not by considering the distance and the transportation conditions appertaining to the routes over which that rate applies, but by deducting a certain differential from the rate between New York and the Michigan point. This differential rate adjustment was formed by the voluntary joint action of all the carriers serving the ports. It depends for its very existence upon the continued participation of every such carrier. And so long as this adjustment remains in existence each of these carriers effectively participates not only in the rates over its own line, but in every rate in the entire structure. In other words, the carriers serving the ports, acting together, exercise effective control over the entire structure of port rates to and from the ports other than Albany [219 I.C.C. 172.]

analysis is adequate in addressing the complex fact pattern we have before us. Here the Frisco has published a reduced rate by independent action in which the MoPac and SP have not concurred. Given these facts, and absent any deliberate action on the part of the Frisco to induce this nonconcurrence, we cannot find that any rail carrier controls the rates to the ports in question, nor can we find that these carriers acting in concert commonly control the rates. There is no evidence that the pricing policies of these railroads with regard to these ports have been jointly developed. On the contrary, each railroad has acted within the scope of its legitimate management discretion to establish cost related rates for these services by independent action. The *Corpus Christi* cases will be reopened to determine whether those decisions are consistent with the action taken here.

Our decision to focus on actual control, rather than to presume that carrier interaction inevitably leads to common control, is reinforced by important policy considerations. Congress stressed in the 4R Act that railroads have a need for flexibility in ratemaking if they are to compete in today's competitive environment.[12] Requiring equalized rates to the ports absent actual common control stifles ratemaking initiatives. Independent and aggressively competitive ratemaking must be encouraged.

Our interest in assuring that rail carriers have actual common control has developed in two stages. In the first set of cases, we determined that when a necessary connecting carrier refused to participate in joint equalized rates, the origin and connecting carriers were not acting in concert and, therefore, did not have common control over

[12]See section 101(b)(3) of the 4R Act.

these rates.[13] In the second group of decisions, which includes this case, we expressed concern that an origin railroad could evade a finding of common control by predicating its proposed joint rates on an unreasonable offer of division of revenue, thus assuring that the connecting carriers would refuse to enter into the joint rate.[14] We, therefore, required the origin carrier to show that it has made good faith offers of divisions. The mechanics of the good faith test can best be explained by beginning with a discussion of respondents' and protestants' respective burdens on the issue of common control.

To demonstrate common control, the protestant has the initial burden of proving that the originating carrier could serve both the preferred and prejudiced ports either by itself or by means of connecting carriers, acting as a network or otherwise. Here, Frisco serves the preferred ports directly and can serve Corpus Christi indirectly by means of SP or MoPac. After the protestant has shown that respondent can serve all the points, the burden then shifts to respondent to go forward and rebut protestant's evidence of control by showing that respondent made a good faith effort to arrive at a division of revenue agreement with the connecting railroads, but was unsuccessful in doing so. When respondent makes such a showing, it demonstrates that it has no actual control of the rates to the ports which it does not serve directly. There is, then, no common con-

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[13] *Soybeans, Midwest to Chicago and Gulf Ports for Export, supra; Corn & Soybeans Midwest to Gulf Ports, for Export,* 349 I.C.C.I.(1974); I. and S. No. 9052 (embraces I. and S. No. 9052 (Sub-No. 1)) *Wheat, New Mexico and Texas to Gulf Ports, supra;* I. and S. No. 9132, *Wheat, Kansas and Oklahoma to Texas Gulf Ports, supra.*

[14] No. 36491, *Wheat, Oklahoma and Kansas to Texas Gulf Ports, supra,* I. and S. No. 9169, *Corn, Wheat or Grain Sorghums, to Texas Ports, supra.*

trol of the rates under consideration. The burden of producing evidence on this issue is placed on the respondent carrier since it alone has access to the division of revenue information.[15]

To summarize, because of the need to assure rate flexibility, we have required proof that the railroads actually control the rates to the preferred and prejudiced ports. In this regard, we believe that the presumption of control extending from the existence of a network such as was found to exist in the Corpus Christi cases is insufficient to assure that actual control exists. While seeking proof of actual control, we have allowed the railroad to show that it does not have such control because it could not, after acting in good faith, arrive at divisions agreements.

DIVISIONS

We turn now to the topic of division of revenue itself, and what is a good faith offer. Our concern is that if an origin carrier is not required to show that it has made a good faith offer of divisions, it could always evade the finding of common control by predicating a lower joint rate upon an offer for divisions of revenues which substantially reduces the share of the connecting carrier, or upon some other condition which could reasonably be expected to induce the nonconcurrence of the connecting carrier. If the connecting carrier refuses to concur after a good faith offer of divisions, the Commission is left with no alternative but to find that the origin carrier does not have common control over the rates to the prejudiced port.

From the facts of this case, there is no doubt that Frisco negotiated divisions in good faith in its attempt to obtain

[15]See *Rate Incentives for Capital Investment*, 353 I.C.C. 760, 766 (1977).

concurrences. It went through established rate bureau procedures, and, after a negative vote by the bureau membership, independently published the lower rates. Even before independent publication, Frisco still attempted to obtain concurrences, based on existing division arrangements from the MoPac and SP, so that the reduced rates would be effective to Corpus Christi.[16] The divisions proffered by Frisco were basically identical to those in effect prior to the rate reductions. The cost evidence indicates that the revenues to the connecting carriers, both with the prior and new rates, were compensatory or only slightly noncompensatory.

The important factor is not the compensatory nature of the divisions, but whether the tender of existing divisions could be considered a good faith offer. Because the tender, if accepted, would have resulted in, at the most, only a small reduction of the connecting carrier's revenues, we again conclude that the respondent did not attempt deliberately to induce the nonconcurrence of its connecting carriers, and that the offers were made in good faith.[17]

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[16]We note that Frisco ultimately did obtain concurrences from Fort Worth and Denver Railway Company and Missouri-Kansas-Texas Railroad Company to the preferred ports.

[17]This is not to say that a tender of the same divisions by an origin carrier will necessarily result in a finding that it has made a good faith tender of divisions. Changed circumstances may render a previously reasonable divisions tender not only unacceptable to the connecting carrier but also so clearly unacceptable that its tender can be viewed as reflecting something less than good faith on the part of the originating carrier. The marginal profitability of the existing divisions to the connecting carriers means that a tender of the existing divisions under any changed circumstances merits careful examination. However, the change here is not so great, nor are the resulting divisions so obviously noncompensatory that we can conclude that the respondent offered them in an attempt to induce nonconcurrence by the connecting carriers.

Thus Frisco's actions in attempting to obtain concurrences, both prior and subsequent to the rate bureau's rejection, demonstrate Frisco's failure to participate effectively in the rates to Corpus Christi. We believe that this inability to obtain concurrences to Corpus Christi after making good faith divisions offers amply demonstrates that Frisco cannot be held responsible for the acts of the destination carriers and that the lawfulness of the reductions should not depend on the actions of those carriers. *Texas & Pacific, supra,* pages 650-51, citing the *Central Railroad* case. We conclude, then, that Frisco does not have control over the rates to the prejudiced port of Corpus Christi. Because Frisco lacks the necessary control over the rates to both the preferred and prejudiced ports, no alternative order can be issued.

The parties contend that we should not inquire into divisions in a section 3(1) proceeding. Protestants believe that, to the extent that inquiring into good faith offers of divisions is an extension of *Corn & Soybeans,* this test is unwarranted in view of the *Corpus Christi* orders. The carriers want us to look only at rates and services without investigation and disclosure of divisions information. Our obligation, however, is to make a decision consistent with the legal principles of *Texas & Pacific* and with facts adequate to support our conclusions. Omission of the good faith test would leave the record barren of facts which are essential to our conclusions on the common control issue. We are not attempting to conclude what divisions are proper, but merely that they were offered in good faith. Our examination of (1) the similarity between existing proposed divisions, (2) Frisco's efforts to obtain concurrences to Corpus Christi, and (3) the relatively small changes in the revenue-to-variable costs ratios, lead us to

conclude that Frisco acted in good faith and thus does not control the rates to Corpus Christi.[18]

In spite of these conclusions, Dreyfus would have the present rates to the preferred ports canceled under section 15(8),[19] thus placing the former and higher rates in effect. Dreyfus apparently reasons that an order to cancel the rates, in contrast to an alternative order, would not require a finding of common control. We do not find it neccessary to resolve this point because, under the circumstances of this case, we will not require a higher level of rates where the lower level is sufficiently compensatory. In the prior decision the cost data showed the lower rates to the preferred ports at 139 to 160 percent of variable costs. In the absence of evidence to the contrary, these ratios sufficiently demonstrate the reduced rates to be compensatory. Dreyfus indirectly supports this view when it terms the sought reduced rates to Corpus Christi, to which the transportation costs are higher, as compensatory. Accordingly, we will not order the reduced rates canceled.

We are urged to conclude that if Frisco acted in "good faith" by its divisions offers, then the connecting carriers acted in "bad faith" by their refusal to join in the reduced rates. We do not agree. Negotiations such as these,

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[18]Protestants have filed a petition for further hearing. Protestants seek to show that Frisco's division offers were considered too low by the connecting carriers. This request is denied. This issue is not whether the carrier offered the largest divisions possible but whether the negotiations were conducted in good faith considering the existing conditions.

[19]We note that in section 202(f) of the Rail Revitalization and Regulatory Reform Act, which amends section 15(7) of the Interstate Commerce Act (now section 15(8)), expressly states that nothing in the 4R Act amends sections 2, 3, or 4 of the Interstate Commerce Act (now 49 U.S.C. 10741 and 10726).

although carried out in good faith, will not necessarily culminate in concurrences. In other words, the test is not whether an agreement is reached, but the substance of the negotiations. Here the connecting carriers acted in good faith and within managerial discretion in rejecting offers that, although they were on the same percentage basis as existing divisions, were slightly lower in monetary terms. Further, our reason for inquiring into the proffered divisions was solely for determining common control and whether a section 10741 order would lie. A finding that all parties to the divisions negotiations acted in good faith precludes the entry of an alternative 3(1) order, under section 10741. Even if we were to find that the connecting carriers had acted in bad faith, they cannot control, and thus cannot adjust, the rates for shipments originating and terminating on Frisco's line.[20] Thus there cannot be a section 10741 alternative order solely against the connecting carriers.

On reconsideration, we find that the assailed rates are not in violation of section 10741 or otherwise unlawful. This decision does not affect the quality of the human environment.

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[20]Dreyfus states that "this mistaken focus of the majority's new section 3(1) doctrine is the fact that an origin carrier supposedly cannot compel a connecting carrier to join in a proposed rate reduction" and cites *Carolina, C. & O. Ry. Co. v. Southern Ry. Co.*, 299 I.C.C. 335, affirmed *Southern Ry. Co. v. United States*, 153 F. Supp. 57. This case focused on the reasonableness of the through rates. Lower rates were prescribed because the routes were commercially closed. The record in the present proceeding does not show that the route has been commercially closed, and thus would not justify requiring connecting carriers to join in a proposed rate reduction.

COMMISSIONER STAFFORD, concurring:

While I agree with the ultimate result, I reaffirm my opposition to the good faith offer of divisions test.

Congressional policy, most recently enunciated in the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210), indicates a clear intention to give railroads the greatest leeway in pricing flexibility. This so-called "good faith" test injects the Commission even more deeply into matters involving carrier management and pricing policies. The issue was resolved rather easily in this proceeding; however, other cases will surely be more difficult and time-consuming. If the carriers cannot arrive at a mutually acceptable joint rate among themselves. I see no need for the Commission to impose itself into the negotiating process.

COMMISSIONER GRESHAM, dissenting:

My dissent to the December 19, 1977 decision in this proceeding expressed the view that (1) the respondent carriers commonly control the rates at issue and (2) the schedules under investigation should either be canceled or extended to Corpus Christi. Within 2 months of that decision, respondents Frisco and MoPac did establish equal rates.

I find the pattern of these Gulf port cases[21] to be disturbing: rates are protested as prejudicial to Corpus Christi; the Commission investigates and finds (over

[21] In addition to the present proceeding, see also Investigation and Suspension Docket Nos. 8454, 8576, 9052 (Sub-No. 1), and 9132. I. and S. No. 8454 is perhaps typical. Denied relief by the Commission, Nueces County filed its court brief in August 1972. Shortly thereafter, in September 1972, the carriers extended the rate reductions to Corpus Christi.

vigorous dissent) no violation of former section 3(1), now 49 U.S.C. 10741(b), because of a lack of common control by the respondents; protestants seek judicial review; *then,* once the carriers become convinced that protestants are serious, they back down and offer equivalent rates to Corpus Christi. In my opinion, these ultimate filings confirm the carriers' control of the traffic.

Two other aspects of today's decision are also troubling.

The majority has ignored section 202(f)(3) of the 4R Act which arguably qualifies the ratemaking flexibility given the rail industry insofar as port rate relationships are concerned. It has also failed to determine if its decision will have a significant adverse effect on the competitive position of the shippers and consignees served by the respondent carriers, in violation of 49 U.S.C. 10704(e)(2), former section 15a(5).

The majority has declined to act under 49 U.S.C. 10704(a)(1), former section 15(1), because of the nature of the traffic and the flexibility needed by the carriers to adjust rates promptly. Taken literally, this is a declaration that the Commission now disavows the use of former section 15(1) with respect to grain. Without expressing an opinion on whether that approach is right or wrong, I note that it is at apparent odds with the pending action in *Feed Grains to New England,* 356 I.C.C. 678, 694-95 (1977), appeal docketed *sub nom. New England Grain and Feed Council, et al. v. United States,* No. 77-1324, D.C. Circuit, filed April 1, 1977.

For these reasons and the additional reasons noted in my separate expression of December 19, 1977, I respectfully dissent from today's decision.

It is ordered:

This proceeding is discontinued.

By the Commission. Chairman O'Neal, vice Chairman Brown, Commissioners Stafford, Gresham, Clapp and Christian. Commissioner Stafford concurring. Commissioner Gresham dissenting.

H. G. Homme, Jr.,
Secretary.

(Seal)

359 I.C.C.

APPENDIX D

No. 31098[1]

NUECES COUNTY NAVIGATION DISTRICT No. 1 v. ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

Decided July 21, 1980

Upon reopening of No. 31098 and No. 33447, actual control and not network of common control found to be the proper standard in *Corpus Christi* cases to establish common source of unreasonable discrimination under 49 U.S.C. 10741. Good faith test can be used to show actual control. Prior orders based on network common control vacated. In No. 36491 (Sub-No. 1)[2] standard applied and prior decision affirmed, as modified.

DECISION

BY THE COMMISSION:

BACKGROUND

The Commission has enuciated a four-part test to determine the issue of unreasonable discrimination under section 10741(b).

[1]This decision embraces No. 33447, Nueces County Navigation District No. 1 v. The Atchison, Topeka & Santa Fe Railway Company, et al., and No. 36491 (Sub-No. 1), Wheat, Oklahoma and Kansas To Texas Gulf Ports.

[2]359 I.C.C. 592 (1979). A petition for review of this case is pending before the fifth circuit in Nos. 78-1348 and 79-1816, *Nueces County Navigation District No. 1, et al. v. ICC and United States*. We sought and were granted permission by the court to reopen this case and resolve the issues first in the prescription proceedings, Nos. 31098 and 33447. This decision does so. It then applies the analysis adopted in Nos. 31098 and 33447 to the *Wheat* case.

> To support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competively injured, actually or potentially, (3) that the defendant carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. The complaining party has the burden of proving the presence of the first three factors and the carriers have the burden of justifying the disparity, if possible, in connection with the fourth factor. *Chicago & Eastern Illinois Railroad v. United States,* 384 F. Supp. 298 (N.D. Ill, 1974), *aff'd mem* 421 U.S. 956 (1975).

See also *Increased Rates Frozen Fruits & Vegetables,* 351 I.C.C. 676, 682 (1976); *Prince Albert Pulp Co., Ltd. v. Canadian Natl. Rys.,* 349 I.C.C. 482, 491 (1974); *Investigation of Railroad Freight Rate Structure,* 345 I.C.C. 1364, 1417 (1976). Thus, a finding of common control (element three of the four-part test) has been found necessary for a violation of 49 U.S.C. 10741. See *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 650 (1933).

By notice served November 15, 1979 and published in the Federal Register on November 26, 1979, we reopened No. 31098, *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.,* 291 I.C.C. 459 (1954) and No. 33447, *Nueces County Nav. Dist. No. 1, v. Atchison, T. & S.F. Ry. Co.,* 315 I.C.C. 155 (1961) (the *Corpus Christi* cases) to determine if port equalization orders entered in these proceedings based on earlier findings or violations of section 10741(b) should be modified. We indicated that our reexamination of these cases would be limited to the issue of actual control of rates to the gulf port and how control of these rates influences the Commission's authority to order relief in cases arising under 49 U.S.C. 10741(b)

(formerly section 3(1) of the Interstate Commerce Act).[3] We stated that we would focus on situations where carriers cannot agree on rate policies and, as a result, concurrences to joint rate changes cannot be obtained. We noted that we favored an analysis of actual control over joint rates in place of a conclusive presumption of common control.

This limiting of the issues to only one of the criteria under section 10741(b) was not and is not intended to detract from the importance the Commission places on the other three criteria. The fourth factor, similarity or disparity in transportation conditions, continues to be our primary consideration. It is axiomatic that there can be no discrimination if economic and operational analysis proves that different rates are appropriate. This analysis includes review of matters such as the different distances involved, alternative routings available, differences in the cost of service, and, especially, any differences in competitive conditions.

The need to undertake this transportation conditions analysis depends, however, on the complaining party's ability to satisfy the remainder of the test. Accordingly, as we were concerned here with the standard to be used in determining common control (the third criteria), and a

[3]Under 49 U.S.C. 10741(b) of the revised act, a common carrier "may not subject a person, place, port, or type of traffic to unreasonable discrimination." Under former section 3(1) of the act, it was unlawful for any common carrier "to make, give, or cause any undue or unreasonable preference or advantage" or to subject a person, place, port, or type of traffic "to any undue or unreasonable preference or advantage" or to subject a person, place, port, or type of traffic "to any undue or unreasonable prejudice or disadvantage." Because there is no substantive change in the law under the recodified statute, and because many of the court and Commission decision arose under the former act, we shall use interchangeably section 3(1) and 10741 and the terms "unreasonable discrimination" and "undue preference and prejudice."

change in that test could, in and of itself, invalidate our earlier prescription orders in these proceedings, we saw no reason to raise as an issue in this proceeding the transportation conditions issue.

The Federal Register notice requested that parties comment on the appropriate legal analysis of the issue of rate control in cases arising under 49 U.S.C. 10741 and the circumstances, if any, under which unequalized rate proposals should be found to violate 10741 when there is no common control.

Fifteen parties filed comments. As might have been anticipated, the port interests generally contended that there is no need to depart from network common control, that the good faith test is not an appropriate measure of common control, and that common control is not required to find a violation of section 10741 except when an alternative order is sought. The rail interests, on the other hand, argued that the old *Corpus Christi* orders have been preempted by the 4R Act and currently applicable standards of railroad ratemaking, that any future violations of section 10741 must be proven on the basis of actual common control, and that, absent common control, there are no circumstances under which rate proposals should be found to violate section 10741. We have considered all the comments received. They are discussed in detail below.

In the *Corpus Christi* cases, the Commission concluded that the carriers serving the Texas ports, acting in conjunction with the originating lines, directly and effectively controlled the grain and grain product rates to the preferred ports (Galveston, Houston, and Port Arthur) and the prejudiced port (Corpus Christi). 291 I.C.C. at 470; 315 I.C.C. at 163. We further found that these rates "are and for the future will be, unduly prejudicial to Corpus Christi and unduly preferential" of Galveston, Houston, and

other Texas ports to the extent that the rates to Corpus Christi exceed those to Galveston and Houston. 291 I.C.C. at 470; 315 I.C.C. at 163. The orders implementing the Corpus Christi reports required each of the defendant carriers "according as they participate in the transportation" to maintain rates which will prevent the undue preference and prejudice found to exist. For the reasons set forth in this decision, we find that the network common control standard used in these reports to determine undue preference and prejudice was inadequate and should be replaced with an actual control standard. We shall vacate the outstanding orders in these proceedings. Future challenges under 49 U.S.C. 10741 to carrier rate adjustments to the ports involved in these proceedings shall be considered under the actual control standard.

Procedural Issues

The Nueces County Navigation District No. 1 and Producers Grain Corporation (District) and the Bunge Corporation and Louis Dreyfus Corporation (Bunge) filed a petition requesting service of pleadings on all parties participating in the reopened cases and filing of replies. They argue that, because this is an adjudicatory proceeding, this procedure is necessary. We disagree. Under the APA, a rate prescription is treated as a rule, 5 U.S.C. 551(4). See *Alaska Steamship Co. v. FMC,* 356 F.2d 59, 61 (9th Cir. 1966). This is a rulemaking and not an adjudication because the Commission ordered the dependent carriers to abstain in the future from maintaining export rates on grain from the involved origin points to Corpus Christi that exceed those to the other Texas ports. 49 U.S.C. 10741. See *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 650 (1933). We are considering a broad change in approach, not application of a prior theory of law to

one particular set of facts. As required for a rulemaking proceeding under the APA, notice was published in the Federal Register informing interested persons of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b). Further, we do not believe cross-service and replies are necessary to a proper decision.

District filed on February 25, 1980, a motion to strike all or part of a number of pleadings because they are not briefs on the legal issues but attempts at injecting factual materials into this proceeding. The New Orleans Traffic and Transportation Bureau filed a motion to strike on February 28, 1980. The motions are not timely and shall be denied. Under rule 21(a) of the Commission's General Rules of Practice, 49 CFR 1100.21(a), a reply or motion addressed to any pleading must be filed within 20 days after the pleading was filed. The challenged pleadings were filed between 46 and 54 days thereafter.

The Common Control Test

The issue of what constitutes common control has produced a great deal of litigation before the courts and the Commission. In *Central Railroad Co. of New Jersey v. United States,* 257 U.S. 247, 259 (1921), Justice Brandeis rejected a strict liability standard for carriers participating in joint rates:

> But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination * * *. If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts

> of its connecting carriers. If that rule should prevail, only uniformity in broad privileges and practices, or the cancellation of all joint rates, could afford the carriers the assurance that they were not in some way violating the provisions of section 3.

The Supreme Court in *Texas & Pacific* attempted to define what Justice Brandeis meant by "participated in some way." It held that because a carrier would not be responsible for the discrimination, and also because an alternative order could not be given, the carrier or carriers "must effectively participate in both rates." 289 U.S. 649-50.

In response to the court decisions, the Commission developed its "network common control" concept in which railroads were viewed as an interlocking network, jointly controlling the rates to and from the ports. The earliest mention of this concept in a port case was in *Albany Port District Comm. v. Ahnappe & W. Ry. Co.*, 219 I.C.C. 151 (1936). We later defined network control in this manner:

> All [of the carriers], acting together, exercise effective control over the entire structure of rates to and from the ports, and therefore each of them participates not only in the rates over its own line, but in every rate in the entire structure, thereby collectively and individually joining in the unduly preferential rates * * * and the unduly prejudicial rates * * *. [*Beaumont, Tex., Port Comm. v. Abilene & S. Ry. Co.*, 253 I.C.C. 127, 132-3 (1942).]

Generally, our policy has been that the larger the geographic area examined, the more likely it is that the railroads would be found to have common control of the rates throughout the entire region. When the Commission

examined widespread rate adjustments, it did not necessarily focus on the rate to each individual point and was more likely to find that the railroads before it controlled the adjustment as a whole.[4]

In port cases, the focus has usually been on rates to only a few points. In recent years, common control has increasingly become a pivotal issue. See *Corn & Soybeans Midwest to Gulf Ports, for Export,* 349 I.C.C. 1 (1974) (vacated by Commission order of June 29, 1978, pending review in *Nueces County Navigation District, et al v. United States,* (N.D. Texas, No. CA-3-74-1253); *Corn, Wheat or Grain Sorghums, to Texas Ports,* 359 I.C.C. 132 (1978). Although in recent cases we have distinguished port cases from proceedings in which large regional and interterritorial rate adjustments are examined, we have in the past given ports the benefit of the network common control theory. The *Corpus Christi* cases are such an example. In reviewing these decisions, we note that common control was largely presumed. There was no extended analysis of whether the defendant carriers effectively controlled the rates. 291 I.C.C. at 469-70; 315 I.C.C. 162. We now find such an analysis of common control to be inadequate.

As a matter of fundamental fairness and in keeping with court interpretations, we believe that actual control, and not network common control, is necessary in finding a section 10741 violation in the *Corpus Christi* cases. The courts have held that section 10741 violations are not a matter of strict liability. Two single-line carriers will not be held accountable, nor will a carrier be liable by merely

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[4]See *Increased Rates Frozen Fruits & Vegetables,* 351 I.C.C. 676 (1976); *Washington Potato & Onion Shippers Assn., Inc., v. U.P.R. Co.,* 300 I.C.C. 537 (1957). But see *Feed Grains to New England,* 356 I.C.C. 678, 691 (1977).

participating in joint rates. See *Central Railroad.* Thus, carriers "must effectively participate in both rates." *Texas & Pacific,* 289 U.S. at 650. Carrier responsibility is necessary for a section 10741 violation; a conclusive presumption of carrier control is a deficient standard.

District and Bunge argue that departing from the network common control standard to one of actual control would change former section 3 and impair the antidiscrimination provisions of the statute enacted by Congress to protect shippers, ports, and localities from pernicious and detrimental actions by carriers. We disagree. Unless the carriers that effectively participate in the joint rates are responsible for a "voluntary and wrongful act," they do not violate former section 3(1), *id.* at 651 and no relief for shippers is appropriate. The standard urged by District and Bunge is basically no standard at all but an irrebuttable presumption leading to total port equalization and minimal or no rate flexibility. We do not believe this is what Congress and the courts intended.

Bunge draws a distinction between rate proposals and an existing network of rates. It states we should not add common control as a prerequisite to exercising our power under section 10741 when faced with unequalized rate proposals. We are not adding common control as a prerequisite under 49 U.S.C. 10741; the courts and Commission have consistently held it is a requirement before a finding of unreasonable discrimination can be redressed. We are here determining a standard for a finding of common control. Further, as we discuss *infra, New York* and *Ayrshire* do not require that we prescribe a rate absent common control.

As we noted above, in recent years we have been using an actual control standard in port cases. In the first of these cases, we found that when a connecting carrier refused to

participate in joint equalized rates, the origin and connecting carriers were not acting in concert and thus did not "control" the rates to the differently treated ports.[5] In our most recent cases on actual control, we have developed the "good faith offer of divisions" test. This test is used when a dispute over divisions is asserted as the obstacle to changing a joint rate. The origin carrier is required to show a good faith offer of divisions to its connecting carriers because of our concern that that carrier could avoid a finding of actual control simply by making an unreasonable offer of divisions of revenue that would assure the refusal of the connecting carriers to agree to adjusting the joint rate.

We find that the good faith test can be used in the *Corpus Christi* cases to determine actual control. That test is described in some detail in the *Wheat* case, 359 I.C.C. at 603-7. Briefly, to demonstrate common control the shipper, port, or locality has the burden of proving that the originating carrier could serve both the preferred and prejudiced ports either by itself or with connecting carriers. After this has been shown, the burden shifts to the carrier

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[5]See *Corn & Soybeans, Midwest to Gulf Ports, for Export*, 349 I.C.C. 1, 4 (1974):

Basic to section 3(1) is the concept of common control. Under outstanding orders of this Commission, if one railroad serves both Houston and Corpus Christi, it may not establish rates to one port without publishing equivalent rates to the other. Further, if two railroads jointly serve both ports, they cannot publish rates favoring one port. However, if one railroad serves one port directly and serves the other by means of joint service with a second railroad, section 3(1) does not give this Commission the power to require equalized rates in the event that the second railroad refuses to participate in an equalized joint rates. The first railroad, by its willingness to offer equivalent service at equivalent rates effectively rebuts any presumption of undue preference or prejudice arising from its publication of a reduced rate to one port.

to go forward and rebut the shipper's evidence of control. It can do so by showing an unsuccessful good faith effort to arrive at a division of revenue with the connecting carriers. When the carrier makes this showing, it demonstrates it has no actual control to the ports it does not directly serve and thus there is no common control. *Id.* at 603-4. Factors we shall consider in determining good faith are: the similarity between existing and proposed divisions; the carrier's efforts in obtaining concurrences; and the relatively small changes in revenue-to-variable cost ratios. *Id.* at 605-6.

The good faith test is criticized because it recognizes divisions disputes between carriers as a lawful reason for withholding reasonable rates to the public. The Santa Fe argues that the level of divisions on joint rates has historically been a matter between carriers.

It is true that, in general, divisions disputes do not justify denying relief to an adversely affected party. But this does not mean that we can never consider them in performing our duties under the act; "a division of a through rate may not *ordinarily* be made the standard of reasonableness of rates or the measure of discrimination." (Emphasis supplied.) *Sulphur, Louisiana and Texas to Mich., N.Y., Ohio, and Pa.*, 287 I.C.C. 129, 151 (1952). Moreover, the courts have not rejected the consideration of divisions of revenues in undue preference and prejudice cases. In light of the requirement of carrier responsibility for a section 1\ 741 violation, the issue of a good faith offer of divisions is properly within the scope of our inquiry.

It is also submitted that the good faith test should apply to connecting as well as originating carriers. We find this argument to be without merit. Only if a connecting carrier participates in both the movements to the allegedly pre-

ferred and prejudiced points can it be said to have common control and thus be subject to an alternative order.

Finally, it is argued that as practical matter the good faith test would put almost all joint rates beyond the reach of section 10741 as the railroads will grasp the simplicity with which charges of unreasonable discrimination can be evaded. We reject this contention. Congress has given us a mandate under 49 U.S.C. 10741 to protect persons, places, ports, or traffic types from unreasonable discrimination. This duty was reiterated in the transportation policy section of the revised Interstate Commerce Act. 49 U.S.C. 10101. We shall carefully scrutinize the evidence the carriers must present to show good faith to ensure that carriers do not "evade" their duty to provide nondiscriminatory rates.

We find that in the *Corpus Christi* cases actual control, which can be established through the good faith test, is necessary to determine the common source of discrimination under 49 U.S.C. 10741(b). Since the network common control standard was used in these cases, we shall vacate our outstanding Corpus Christi orders.

Rate Prescriptions in the Absence of Common Control

Parties here have argued, based on *New York v. United States,* 331 U.S. 284 (1947) and *Ayrshire Corp. v. United States,* 335 U.S. 573 (1949), that, even if common control is absent, rates can be prescribed under 49 U.S.C. 10704 (formerly section 15(1)) to remedy unreasonable discrimination. The *Wheat* case indicated some support for this position, although cautioning that it is unclear whether *New York* would have reached the same conclu-

sion if the issues had been limited to section 15(1). 359 I.C.C. 593, 599.

We disagree with these interpretations of *New York* and *Ayrshire*. In both cases, the reasonableness of the rate was also involved.

In cases such as those before us now which are limited solely to issues of discrimination, the only requirement for a remedy is that the discrimination be removed. This may be done by lowering one rate to the level of the other, raising one rate to the level of the other, or equalizing the rates anywhere in between. In these cases, the Commission is not called upon to make a judgment as to the reasonableness of the ultimate rate level.

Of course, there may be instances where the level of the rate is also at issue. A complainant may seek a prescription of a reasonable rate along with the discrimination relief if it believes the rate it is complaining about is unreasonably high. Or, the Commission, on its own initiative, may reach a similar conclusion. Clearly, we have authority under section 10704 if the rate is unreasonable or otherwise unlawful to prescribe rates. *New York* is consistent with this analysis. There the court recognized that the fixing of reasonable class rates throughout the Nation was done under former section 1, despite the fact that issues of discrimination also were involved. *New York,* 331 U.S. at 342. *Ayrshire* also involved a Commission determination that not only must discrimination be cured, but maximum reasonable rate findings were required. *Ayrshire,* 335 U.S. at 582-583.

We recognize that there is language in both these cases (notably *New York* at 342-43) that could lead one to con-

clude that the Commission may find unreasonable discrimination and prescribe a remedy (other than an alternative order) in the absence of common control. The following excerpt, taken out of context, could produce this conclusion.

> If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to section 3(1) fell far short of its goal.

However, when read in context with the immediately preceding discussion of section 1 issues and the court's recognition of the role of that section in these cases, we believe it is clear that the cited language was not intended to require the Commission to prescribe a rate to remove discrimination under former section 3(1) absent a finding by the Commission that such a prescription is necessary to correct rates which are otherwise unlawful. To read the quoted language as providing a new test of discrimination omitting the common control requirement would lead to the anomalous result in which the harsher remedy of a rate prescription applies when one of the four section 10741 factors is missing while the more flexible remedy of an alternative order applies when all four factors are present.[6]

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[6]Moreover, especially in the *New York* case, the court was considering the Commission's power to adjust rates on a broad territorial basis which is not involved here.

In light of this, it cannot convincingly be argued that common control is merely a procedural element necessary to issue an alternative order. It is instead, substantive evidence of carrier responsibility for unreasonable discrimination. Section 10704 is a remedial section of the act which provides for the prescription of maximum or minimum rates once there has been a violation of one of the substantive parts of the act. Unreasonable discrimination is such a substantive provision; common control is merely one of the case law developed criteria for a finding of unreasonable discrimination. Therefore, a rate cannot be prescribed absent common control unless there is some other violation of the act.

Even if *New York* and *Ayrshire* could be read as authorizing the Commission to prescribe rates absent a finding of common control or a violation of some other section of the act, clearly they do not require the Commission to do so. All of the reasons which support our belief that the act should be interpreted as we have indicated support a determination that, if we have this authority, it should not be exercised. Accordingly, we conclude that, even if we have the authority, we will not prescribe a rate to remove unreasonable discrimination absent common control unless it is necessary to cure some other violation of the act.

What we have said here as to exercise of our authority under section 10704 is equally applicable to our exercise of authority under other remedial sections of the act. Without a finding of substantive violation of the act, we will not order a rate canceled.[7]

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[7]See *New York v. United States*, 562 F. 2d 887, 898 (2d Cir. 1977), *Increased Rates Frozen Fruits & Vegetables*, 351 I.C.C. 676, 682 (1976), and *Corn and Corn Products, Illinois to Official Territory*, *332 I.C.C. 485, 490 (1968).*

Port Relationships

Finally, it is argued that certain ratemaking amendments of the 4R Act do not modify the application of section 10741 or affect the authority of the Interstate Commerce Commission related to rate relationships between ports. We agree. Neither this decision nor the *Wheat* case are consistent with this section. The act provides no special standards for review of port relationships. Rates for the ports are judged on the same basis as other rates, with the same standards of lawfulness. Moreover, our findings are in keeping with section 101(b)(3) of the Railroad Revitalization and Regulatory Reform Act of 1976 which declares it to be the policy of the Congress to permit the railroads greater freedom to raise or lower rates in competitive situations. This statement of congressional policy supports the actual control standard. A policy of near strict liability does not comport with carrier freedom. To impose a strict liability standard of network common control without regard to the ability of the carrier to remedy the unlawful discrimination is totally at odds with congressional policy of giving railroad management greater rate flexibility. Similarly, our refusal to prescribe a rate in the absence of actual control also comports with the congressional policy encouraging pricing flexibility and competition.

The Wheat Case

By order of January 29, 1980, the United States Court of Appeals for the Fifth Circuit remanded the record in the *Wheat* case to the Commission. *Nueces County Navigation District No. 1, et al. v. United States,* Nos. 78-1348 and 79-1816. For the reasons indicated in this decision, we reaffirm our application in the *Wheat* case of the actual control standard.

In this case, the St. Louis-San Francisco Railway Co. (Frisco) published reduced rates to certain Texas ports it serves in joint-line service in connection with Fort Worth and Denver Railway Co. (FWD) and Missouri-Kansas-Texas Railroad Co. (MKT).[8] The carriers with which it connects to serve Corpus Christi refused to join in similar reductions to that port, despite Frisco's continued good faith offers of division. We find that the *Wheat* case properly held that the assailed rates were not in violation of section 10741 because there was no finding of actual control. We reaffirm the *Wheat* case finding that actual control is determined by surrounding circumstances, including good faith offers of divisions.

We also reaffirm the *Wheat* case finding that no prescription under section 10704 may be ordered both for the reasons stated in that decision and because, as we have indicated in this decision, there must be a finding of a violation of a substantive section of the act before a rate can be prescribed. The only allegations of unlawfulness in this proceeding concern section 10741. To the extent the *Wheat* case indicates that a prescription to correct unreasonable discrimination in the absence of common control may be ordered, it is modified in accordance with this decision.

It is ordered:

The orders in No. 31098, *Nueces County Navigation District No. 1 v. Abilene & Southern Railway Company,*

---

[8]We also wish to clarify that, contrary to the statement at 359 I.C.C. 603, Frisco does not serve any of the allegedly preferred points directly. The Frisco's lines do not extend south of Dallas, and Fort Worth, TX, and Frisco obtained concurrences from FWD and MKT to serve the allegedly preferred ports. See 359 I.C.C. at 604, footnote 16, December 19, 1977 decisions at 8.

et al. and No. 33447, *Nueces County Navigation District No. 1 v. The Atchison, Topeka & Santa Fe Railway Company, et al.*, are vacated.

The actual control standard shall be used to determine the common source of unreasonable discrimination under 49 U.S.C. 10741(b) in future challenges to carrier rate adjustments to the ports in these proceedings.

Our decision in No. 36491 (Sub-No. 1), *Wheat, Oklahoma and Kansas To Texas Gulf Ports* as it applies the actual control analysis is affirmed. The discussion of rate prescriptions in the absence of common control is modified, as described in this decision.

This decision will not significantly affect either the quality of the human environment or conservation of energy resources.

This decision is issued pursuant to the authority of 49 U.S.C. 10321 and 10741 (the Interstate Commerce Act) and 5 U.S.C. 553 and 559 (the Administrative Procedure Act).

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam. Commissioner Stafford concurring in the result. Vice Chairman Gresham not participating.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

APPENDIX E

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 19th day of January, A. D. 1954.

No. 31098

NUECES COUNTY NAVIGATION DISTRICT NO. 1

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof, and the division having found in said report that the assailed rates on grain, grain products, and articles taking the same rates, in carloads, from points in eastern Colorado, Kansas, Missouri, Illinois, Iowa, Nebraska, South Dakota, North Dakota, Minnesota, and Wisconsin to Corpus Christi, Tex., for export, are, and for the future will be, unduly prejudicial to Corpus Christi and unduly preferential of Galveston, Houston, and other Texas ports to the extent that said rates exceed or may exceed the rates on like traffic to Galveston and Houston:

It is ordered, That the defendants named in the complaint, to the extent that they participate in the unduly preferential and prejudicial rates, be, and they are hereby

notified and required to cease and desist, on or before April 29, 1954, and thereafter to abstain, from practicing the undue prejudice referred to in the next preceding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before April 29, 1954, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 3.

GEORGE W. LAIRD,
Secretary.

(SEAL)

APPENDIX F

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 14th day of November, A. D. 1961.

No. 33447

NUECES COUNTY NAVIGATION DISTRICT NO. 1

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
ET AL.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaint, to the extent that they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 20, 1962, and thereafter to abstain, from practicing the undue prejudice and preference found in said report to exist.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, *on or before*

February 20, 1962, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and *apply rates, transit arrangements, regulations, and* practices which will prevent and avoid the undue prejudice and preference found in said report to exist.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 78-1348, 79-1816
80-1842 & 80-1843

ICC 36491

U.S. COURT OF APPEALS
FILED
JUN 1 1982
Gilbert F. Ganucheau
Clerk

NUECES COUNTY NAVIGATION DISTRICT NO. 1 et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

PRODUCERS GRAIN CORPORATION, et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al, Respondents.

NUECES COUNTY NAVIGATION DISTRICT NO. 1, et al, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

PRODUCERS GRAIN CORPORATION, et al, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

PETITIONS FOR REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

ON PETITION FOR REHEARING

(June 1, 1982)

Before CLARK, Chief Judge, RUBIN and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

APPENDIX H

SECTIONS OF THE INTERSTATE COMMERCE ACT PRIOR AND SUBSEQUENT TO RECODIFICATION

49 U.S.C. 3(1): It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C. 10741(b): A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

49 U.S.C. 12(1)(a): The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons

controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

49 U.S.C. 10321(a): The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

49 U.S.C. 15(1): Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

49 U.S.C. 10704(a)(1): When the Interstate Commerce Commission, after a full hearing, decides that a rate

charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum of minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Commission.

Office - Supreme Court, U.S.
FILED
NOV
ALEXANDER L. STEVAS,
CLERK

No. 82-341

In the Supreme Court of the United States

OCTOBER TERM, 1982

NUECES COUNTY NAVIGATION DISTRICT NO. 1, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Interstate Commerce Commission is not required to equalize rates to two ports served by one origin carrier under joint rates with different connecting carriers over whose rate-making the origin carrier has no actual control.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-341

NUECES COUNTY NAVIGATION DISTRICT NO. 1, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 674 F. 2d 1055. The decisions of the Interstate Commerce Commission in Docket No. 36491 (Sub-No. 1) (Pet. App. 28a-65a, 66a-91a) and the Commission's decision in Docket Nos. 31098 and 33447 on reopening (Pet. App. 92a-109a) are reported at 357 I.C.C. 382, 359 I.C.C. 592, and 364 I.C.C. 269, respectively.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1982. A petition for rehearing was denied on June 1, 1982 (Pet. App. 114a-115a). The petition for a writ of certiorari was filed on August 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This litigation involves the issue of the Commission's authority to determine what constitutes a showing of "common control" sufficient to establish a prima facie case for relief in discrimination cases under 49 U.S.C. (Supp. IV) 10741(b) where a carrier serves different ports indirectly under joint rates.[1] Common control is an essential element in a discrimination case because, in order to discriminate, a carrier must be responsible for the treatment accorded to both the preferred and the prejudiced ports.[2] If the Commission finds common control—and the other elements of a

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[1]"Joint rates" are rates between two or more carriers. Under the law prevailing at the time this case was decided by the Commission and the court of appeals, a joint rate could not be changed without the concurrence of all parties to the rate, nor could it be cancelled over the objection of one of the parties without Commission approval. Each carrier participating in a joint rate accrues "divisions," i.e., a portion of the revenues received. Divisions are usually established by agreement among the carriers. Thus, when a participant in a joint rate desires to change that rate, it usually will propose to its joint rate partners what each participant's division of the new rate will be. This may be arrived at simply by applying established percentage shares to the new rate, or it may effect a change in the percentage share of the participants.

The Staggers Rail Act of 1980, Pub. L. No. 96-448, Section 217(a)(1), 94 Stat. 1916, added a new Section to the Interstate Commerce Act (49 U.S.C. (Supp. IV) 10705a), which substantially modified the Act with respect to joint rates and divisions. However, the court below expressly limited its holding to the law as it existed prior to enactment of the Staggers Rail Act (Pet. App. 3a).

[2]To establish that rail rates are discriminatory, i.e., that they treat one shipper or locality differently from another under comparable conditions, a complainant must show that a disparity in rates exists, that it is competitively injured by the disparity and that a carrier, or group of carriers, controls the rates to both the preferred and the prejudiced ports. If the complainant makes the proper showing, then the railroads can justify the rate disparity on the basis of different transportation conditions. *Chicago Board of Trade* v. *Illinois Central R.R.*, 344 I.C.C. 818, 840 (1973), aff'd *sub nom. Chicago & E.I.R.R.* v. *United States*, 384 F. Supp. 298 (N.D. Ill. 1974), aff'd, 421 U.S. 956 (1975).

Section 10741(b) case—it traditionally has prescribed equalized rates by issuing a so-called "alternative order". An alternative order requires the carrier to remove the discrimination by lowering the rate to one port, raising the rate to the other, or equalizing both rates at some point in between. Absent a finding of common control, a carrier can adjust its rates to any of a group of ports it serves under joint rates even if it cannot obtain concurrences from some of the other carriers involved.

Petitioner challenges the Commission's authority to determine that, where joint rates are involved, the proper standard of proof is actual control by the complained of carrier to both the allegedly prejudiced and preferred ports.

2. In the *Corpus Christi I* cases[3] (ICC Docket Nos. 31098 and 33447), which were decided in 1954 and 1961 and which were never appealed, the Commission determined that the carriers serving certain Texas ports, together with the originating lines in the origin territory, directly and effectively controlled the rates to the preferred ports (Galveston, Houston, and Port Arthur) and the prejudiced port (Corpus Christi). *Nueces County Navigation District No. 1* v. *Abilene & S. Ry.*, 291 I.C.C. 459, 470 (1954); *Nueces County Navigation District No. 1* v. *Atchison, T. & S.F. Ry.*, 315 I.C.C. 155, 162 (1961). The Commission in effect presumed common control. Rather than requiring actual proof of control (see 291 I.C.C. at 469-470; 315 I.C.C. at 162), it viewed the carriers as an interlocking network jointly controlling the rates to and from the ports. Thus, their mere participation in joint rates coupled with the fact that their tracks intersected supplied the basis for the Commission's finding that there was common control.

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[3]For the sake of convenience, we will use the same nomenclature as the court of appeals in referring to these cases. See Pet. App. 25a-26a.

Having found common control and no different transportation conditions to justify a rate disparity, the Commission concluded that the assailed grain export rates, "are, and for the future will be," unduly prejudicial to Corpus Christi, and unduly preferential of Galveston, Houston and the other Texas ports to the extent that the rates to Corpus Christi exceed those to Galveston and Houston. 291 I.C.C. at 470; 315 I.C.C. at 163. The orders implementing the Commission's reports (Pet. App. 110a-111a, 112a-113a) required that the defendant carriers cease and desist from the practices that resulted in the undue prejudice found to exist.

In the 1970's the Commission began to take a more detailed look at common control. Rather than merely presuming control, it developed the concept of "actual control," i.e., focusing on the particular circumstances of connecting carriers' refusal to concur in changes where joint rates were involved. In a series of decisions, the Commission found that when a connecting carrier refused to participate in joint equalized rates, and it was not shown that the origin and connecting carriers were acting in concert, there was no common control of the rates to the differently treated ports. See *Soybeans, Midwest to Chicago & Gulf Ports, Export*, 335 I.C.C. 883 (1970), vacated as moot, 416 U.S. 953 (1974); *Corn & Soybeans Midwest to Gulf Ports for Export*, 339 I.C.C. 595, modified, 349 I.C.C. 1 (1974), vacated by the Commission as moot, No. INS 8576 (June 30, 1980), appeal dismissed as moot *sub nom. Nueces County Navigation District* v. *United States of America*, Civil Action No. CA—3-43-1253-D (N.D. Tex. Aug. 25, 1982).[4]

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[4]Petitioner erroneously states (Pet. 6 n.7) that district court proceedings in the last cited case remain in abeyance.

3. Proceedings in the *Wheat* cases (ICC Docket No. 36491 (Sub-No. 1)) began in 1977 when the St. Louis San Francisco Railway (Frisco)[5] published reduced rates on wheat from origins in Oklahoma and Kansas to various Texas ports but not to Corpus Christi. Frisco had lowered the rates to the other Texas ports to meet rail and truck rate competition; it had not done so for Corpus Christi because Frisco had no direct line to that port and the connecting rail carriers to Corpus Christi (the Missouri Pacific Railroad (MoPac) and the Southern Pacific Transportation Company (SP)) had refused to concur in a lowered joint rate equivalent to that published for the other ports.[6]

Various Corpus Christi port and shipping interests protested on grounds that the rates were unduly preferential of the other Texas ports and prejudicial to Corpus Christi, in violation of former Section 3(1) of the Interstate Commerce Act, (49 U.S.C. 3(1)) now codified at 49 U.S.C. (Supp. IV) 10741(b).

In December 1977, the Commission issued a decision (*Wheat I*) holding that Frisco did not actually control the disparate rates and that Frisco had made a good faith offer of division of the proposed reduced joint rates to the connecting carriers serving Corpus Christi (Pet. App. 52a-56a). The Commission added the "good faith offer of divisions" test to the actual common control standard developed in the 1970 Commission decisions discussed above in order to ensure that carriers do not evade a common control finding by making a divisions offer so low that the connecting

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[5]Frisco is now merged into the Burlington Northern, Inc.

[6]Concurrences were obtained from the Fort Worth and Denver Railway (FWD) and the Missouri-Kansas-Texas Railroad (MKT), carriers that serve the other ports at issue here, but not Corpus Christi.

carriers are effectively forced to refuse to concur (Pet. App. 53a-54a).[7]

In February 1979, the Commission, in *Wheat II*, affirmed its previous findings (Pet. App. 66a-91a), and ordered that the *Corpus Christi I* cases be reopened to determine whether those decisions were consistent with the *Wheat* cases. The Commission then published a Federal Register notice reopening the *Corpus Christi I* cases and requesting comments on the issue of common control of rates to the Gulf ports.[8] The Commission also obtained a remand of the record in the *Wheat* cases from the court of appeals so that it might reconsider its decisions in those cases in light of its reopening of the *Corpus Christi I* cases.

In the resulting joint decision on reopening issued in both proceedings (*Corpus Christi II*), the Commission, after extensive analysis, expressly abandoned its former network common control theory and held that, in the determination of discriminatory rates issues involving ports under Section 10741(b), it would utilize an analysis of actual control by the origin carriers, applying the good faith offer of divisions test enunciated in the *Wheat* cases (Pet. App. 96a-99a, 101a). The Commission accordingly vacated the inconsistent decisions in the *Corpus Christi I* cases and reaffirmed its holdings in *Wheat I* and *Wheat II*. The Commission also rejected petitioner's argument that, even if common control is absent, it should prescribe specific rates to be charged. It explained that common control is a substantive element of a

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[7]Under this test, an origin carrier will have to establish that it has made a good faith offer of divisions before it can claim that nonconcurrence of the connecting carriers deprived it of common control. If the Commission determines from the evidence submitted that a reasonable offer was made, then good faith will be shown (Pet. App. 53a, 83a-84a).

[8]Fifteen parties filed comments. See Pet. App. 95a.

discrimination case and that, therefore, it would not prescribe rates absent common control or a finding of some other violation of the Act (Pet. App. 103a-106a).

4. The court of appeals affirmed in all aspects the Commission's decision adopting the actual common control standard and the vacation of the *Corpus Christi I* orders (Pet. App. 1a-27a). The court held that the adoption of the new standard was consistent with recent congressional policy to permit railroads greater freedom to raise or lower rates and was consistent with prior decisions of this Court. It observed that Congress, in Section 10741(b), gave the Commission a mandate to protect against "unreasonable" discrimination and that the determination whether a discrimination is undue or unreasonable has always been a question committed to the Commission's discretion. Moreover, the court pointed out that Congress has never sanctioned the "network common control" standard or indicated that that standard should "be frozen into the administrative process of determining whether joint rates are discriminatory" (Pet. App. 19a (footnote omitted); *id.* at 19a-20a n.9).

Turning to petitioner's procedural claims, the court of appeals rejected the view that the Commission should have proceeded by adjudication and not rulemaking when it reopened *Corpus Christi I* (Pet. App. 21a-23a). Similarly, the court concluded (*id.* at 23a) that the vacation of the continuing *Corpus Christi I* orders that conflict with the new policy "may reasonably be considered an appropriate method within the Commission's discretion by which it could implement its adoption of the new actual common control standard." On its own motion, the court of appeals dismissed as moot the petitions seeking review of the *Wheat* cases on grounds that Corpus Christi is no longer prejudiced by having to pay rates higher than those applicable to

the other Texas ports and thus has received the relief sought in the *Wheat* litigation (Pet. App. 6a-7a & n.4).[9]

ARGUMENT

Notwithstanding the complicated history of this litigation, this case presents no legal issue of general importance warranting this Court's review. The Commission's decision to permit railroads charged with rate discrimination to demonstrate that they lack the control over joint rates necessary to establish a violation of Section 10741(b) if, despite their good faith efforts, they have been unable to obtain necessary concurrences in joint line rates from some of their connecting carriers is well within the agency's discretion. The decision of the court of appeals, upon which we essentially rely, correctly affirmed the Commission's interpretation of its responsibilities under the discrimination statute and does not conflict with the decisions of this Court or of any other court of appeals.

Moreover, the significance of the challenged ruling is limited by virtue of the lower court's explicit limitation of its decision to the law as it existed prior to enactment of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (see Pet. App. 3a). Although the new statute preserves existing law with regard to the Commission's authority to

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[9]Following the Commission's decision in *Wheat I*, MoPac concurred in a reduced joint rate to Corpus Christi, and rates were equalized, technically mooting the *Wheat* cases. In order not to thwart judicial review of the adoption of the actual common control standard, however, the Commission decided not to discontinue the *Wheat* proceedings (Pet. App. 69a-71a). The court of appeals held that the *Wheat* determinations were in fact moot and dismissed, but did not vacate, those cases since "[n]o suggestion of mootness is made with regard to the *Corpus Christi II* issues" (Pet. App. 7a). As the court of appeals noted (*ibid.*), *Corpus Christi II* has various "continuing effects." The Commission vacated its continuing rate equalization orders in *Corpus Christi I* and thereby deprived Corpus Christi interests of a former remedy by which to attack rail rate disparities.

prescribe port relationships, 49 U.S.C. (Supp. IV) 10741(b), it also adds numerous provisions that affect the regulation of railroads participating in joint rates and that would have to be taken into consideration in future cases.

1. Petitioner principally argues (Pet. 8-18) that the Commission's determination that carrier responsibility, i.e., common control,[10] is necessary for a Section 10741(b) violation, so that a carrier will not be held accountable merely because it participates in joint rates, conflicts with decisions of this Court. But as the court of appeals correctly observed (Pet. App. 9a-10a, 13a), the Commission (*id.* at 97a-100a) based its analysis squarely on *Texas & Pac. Ry.* v. *United States*, 289 U.S. 627, 649-650 (1933), and *Central R.R.* v. *United States*, 257 U.S. 247, 259 (1921), decisions holding that mere participation in joint rates does not make connecting carriers partners, and that a carrier must "effectively participate" in both rates if an order correcting the disparity is to run against the carrier.[11]

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[10]The lower courts have firmly established that in order to establish a violation of Section 10741(b), all four elements of a discrimination case—a disparity in rates, competitive injury, common control, and evidence that the disparity in rates is not justified by transportation conditions—must be shown. *Chicago Board of Trade* v. *Illinois Central R.R., supra*, 344 I.C.C. at 840; *Chicago & E.I.R.R.* v. *United States, supra*, 384 F. Supp. at 300-301; *Harborlite Corp.* v. *ICC*, 613 F. 2d 1088 (D.C. Cir. 1979); *New York* v. *United States*, 568 F. 2d 887, 898 (2d Cir. 1977); *A. Lindberg & Sons, Inc.* v. *United States*, 408 F. Supp. 1032, 1037 (W.D. Mich. 1976); *Baltimore & O.R.R.* v. *United States*, 391 F. Supp. 249, 259 (E.D. Pa. 1975).

[11]Petitioner unsuccessfully attempts to minimize the relevance of these decisions by arguing (Pet. 9-10) that in *Texas & Pac. Ry.* the Court held that the ports did not come within the discrimination statute, and that *Central* involved a transit privilege rather than discrimination between two ports. *Central* is significant, however, for its general holding that railroads are not engaged in unjust discrimination if they are powerless to influence the actions of other carriers. 257 U.S. at 257-258.

Furthermore, there is no merit to petitioner's indirect attack on the Commission's determinations that (1) a substantive violation of the Act is required before the

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As for *Texas & Pac. Ry.*, this Court stated, well after the terms "port and port district" were added to the statute in 1935:

> For the principle announced in *Central R. Co.* v. *United States* and *Texas & Pacific R. Co.* v. *United States, supra*, is applicable only where the Commission is directing the carriers to remove the discrimination. *Those cases hold that the Commission may not require carriers to do what they are powerless to perform.*

New York v. *United States*, 331 U.S. 284, 342 (1947) (emphasis added). Thus, this Court's decisions in *Central* and *Texas & Pac. Ry.* provide a firm basis for the Commission's position and remain good law today.

Moreover, petitioner's reliance (Pet. 8-12) on other decisions of this Court is misplaced. *Houston, E. & W. T. Ry.* v. *United States*, 234 U.S. 342 (1914), merely states that discrimination was a primary concern of Congress in promulgating the Interstate Commerce Act. *Louisville & N.R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925), involved a reparations order for excessive charges and a rate reasonableness question, neither of which were at issue in the instant litigation where the carrier's intent was to lower rail rates to meet truck competition. In *Sloss-Sheffield*, the Court stated that "the establishment of a joint rate *by the concurrence of connecting carriers* is necessarily the act of each, because the establishment of the rate is done *by their joint agreement*." 269 U.S. at 233 (emphasis added). In the *Wheat* cases, however, Frisco did not lower the rate to Corpus Christi only because it could not achieve concurrences from the connecting carriers. The decision in *St. Louis S.W. Ry.* v. *United States*, 245 U.S. 136 (1917), like that in *Sloss-Sheffield*, rested primarily on reasonableness, and not on discrimination, grounds. 245 U.S. at 145. In addition, the passage from *St. Louis S.W. Ry.* quoted by petitioner (Pet. 12) establishes only that a connecting carrier is not immune from the discrimination provisions of the Act merely because its rails do not reach the locality that is being discriminated against. But that does not mean that every connecting carrier must necessarily be liable in every case in which discrimination in joint rates is shown, even where, as here, the connecting carrier has unsuccessfully sought the concurrence of the other carriers to a nondiscriminatory joint rate. Furthermore, *Sloss-Sheffield, C., I. & L. Ry.* v. *United States*, 270 U.S. 287 (1926), and *United States* v. *Illinois Central R.R.*, 263 U.S. 515 (1924), are all decisions *affirming* the Commission's finding of unreasonable discrimination under a narrow standard of review. This case, of course, involves the vastly different question

Commission can prescribe a rate under 49 U.S.C. (Supp. IV) 10704;[12] and (2) even if the Commission has the authority to prescribe rates absent a finding of common control or a violation of some other section of the Act, it need not exercise that authority. Without expressly challenging the merits of the Commission's view, petitioner contends (Pet. 16-18) that the Commission and the court of appeals failed adequately to consider this Court's decisions in *New York* v. *United States*, 331 U.S. 284 (1947), and *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949). The record, however, does not support this claim. On the contrary, it establishes that the Commission carefully distinguished *New York* and *Ayrshire* from the agency's determination in this litigation (Pet. App. 103a-106a) and that the Commission's interpretation is reasonable and consistent with its statutory authority.[13]

As the Commission observed (Pet. App. 104a), there are fundamental differences between *New York* and *Ayrshire* and this case. First, *New York* and *Ayrshire* raised questions of rate reasonableness as well as discrimination. In

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whether the Commission properly exercised its discretion not to hold carriers responsible for discrimination in specified circumstances.

Finally, petitioner cannot rely on the old Commission cases cited (Pet. 15), because they preceded the Commission's decision to alter its policy on common control.

[12]Section 10704(a)(1) provides that when the Commission, after a full hearing, decides that a rate charged does or will violate the Act, it may establish a specific rate to be charged. See *Arizona Grocery* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 387 (1932).

[13]Like the Commission, the court below took this Court's decisions in *New York* and *Ayrshire* into account (Pet. App. 10a n.6). However, it failed squarely to decide when rate prescription is appropriate because it lacked the factual context necessary for such a determination in view of the mootness of the *Wheat* cases. Nevertheless, by affirming *Corpus Christi II* (Pet. App. 17a-21a), the court implicitly agreed with the Commission's analysis that *New York* and *Ayrshire* do not foreclose adoption of the actual common control standard.

contrast, the *Wheat* cases, like *Texas & Pac. Ry., supra*, arose purely in a discrimination context. Second, the Commission noted (Pet. App. 105a) that in *New York* the Court was considering the Commission's power to adjust rates on a broad territorial basis, whereas the *Corpus Christi I* and *Wheat* cases involved shipments from limited origins to ports in one state. Finally, while the *New York* and *Ayrshire* decisions are instances where the Court affirmed the Commission's determination that rates should be prescribed, the Commission concluded here that it would be inappropriate to prescribe rates under the facts presented. For these reasons, the Commission correctly found (Pet. App. 104a-106a) that even if language in *New York* and *Ayrshire* could be read to support the view that the Commission *may* find unreasonable discrimination and prescribe rates absent a finding of common control, the decisions do not *require* that it do so absent a determination that prescription is necessary to correct rates that are otherwise unlawful. To read the cases otherwise, the Commission explained (Pet. App. 105a), would lead to an anomalous result. The harsher remedy of a rate prescription would apply when one of the Section 10741 prerequisites (i.e., common control) is missing, while the more flexible remedy of an alternative order would apply when all four factors are present.

2. Petitioner also suggests (Pet. 12, 15-16) that the Commission must continue to interpret common control in the same way as it has in the past. However, no authority is cited to support the contention that the Commission is bound by its prior policy of viewing the carriers as an interlocking network and effectively presuming control. Indeed, the decisions of this Court fully support the Commission's authority to adopt a new view based upon reconsideration of the ever changing conditions in the industries that it regulates, so long as its determination is consistent

with the statutory limits upon its authority. *American Trucking Associations, Inc.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). The Commission's determination that the public interest will be better served under a common control standard that takes into account the facts and circumstances of each case clearly meets this test. As the court of appeals pointed out (Pet. App. 8a), Section 10741(b) directs the Commission to protect persons, places, ports, or types of traffic from "unreasonable discrimination." What constitutes an "unreasonable" discrimination, therefore, is for the Commission to determine. *New York* v. *United States, supra*, 331 U.S. at 347; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352-353 (1940); *Manufacturers Ry.* v. *United States*, 246 U.S. 457, 481 (1918).[14] The network common control standard, moreover, was merely a creation of the Commission that, as the court of appeals correctly found (Pet. App. 19a-20a), was never sanctioned by Congress. Accordingly, the Commission's decision to change its interpretation in view of the policy of the 4-R Act to permit rail carriers greater rate flexibility[15] was a permissible exercise of its discretion.

3. Petitioner's contention (Pet. 19-21) that the Commission should not inquire into divisions in a discrimination proceeding ignores the fact that the good faith offer of

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[14]Petitioner urges (Pet. 21-23) that the court of appeals erred in granting deference to the Commission's interpretation of its responsibilities under Section 10741(b). The decisions of this Court, however, have firmly established the legal principle that courts should accord substantial deference to an agency's construction of the statute that it is charged with administering. E.g., *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 598 (1981); *Miller* v. *Youakim*, 440 U.S. 125, 145 n.25 (1979); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 539 (1940).

[15]See *Atchison, T. & S.F. Ry.* v. *United States*, 606 F. 2d 442, 445-446 (4th Cir. 1979); *Harborlite* v. *Southern Pacific*, 364 I.C.C. 585, 587, 594 (1981).

divisions test will protect shippers and port interests like petitioner by ensuring that rail carriers cannot evade a common control finding by making a divisions offer so low that the connecting carriers are effectively forced to refuse to concur. See Pet. App. 84a-86a, 102a-103a. While it is true that, in general, divisions disputes do not justify denying relief to an adversely affected party (e.g., *Louisville & N.R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925)), this does not mean that the Commission can never consider divisions in performing its duties under the Interstate Commerce Act. In light of the requirement of carrier responsibility for a Section 10741 violation, the Commission correctly concluded (Pet. App. 102a) that "the issue of a good faith offer of divisions is properly within the scope of our inquiry."

4. There similarly is no merit to petitioner's claim (Pet. 24) that if the Commission's rate determinations in the *Wheat* cases are moot, they should have been remanded to the Commission with directions to vacate the decisions and dismiss the proceedings.[16] In the circumstances of this case, the court of appeals correctly decided to dismiss as moot only the petitions for review "that raise issues directed solely to the invalidity of the *Wheat* determinations" (Pet. App. 7a).[17]

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[16]Petitioner's suggestion (Pet. 23-24) that the *Wheat* cases are not moot is specious. As the court of appeals observed (Pet. App. 7a n.4), petitioners themselves conceded below that the *Wheat* adjudications are of no continuing effect. Following the Commission's decision in *Wheat I*, MoPac concurred in a reduced rate to Corpus Christi equivalent to the reduction published for the other Texas ports. As a result, Corpus Christi is no longer prejudiced by the Frisco rates that originally caused this litigation.

[17]Petitioner's appeals of the 1977, 1979 and 1980 decisions in the *Wheat* adjudication were docketed as Nos. 78-1348, 79-1816 and 80-1842 in the court of appeals. Petitioner filed a separate petition for review of the 1980 decision in the *Corpus Christi* cases that was docketed as No. 80-1843 below. The court of appeals determined (Pet. App.

Where it appears on appeal that a controversy is "entirely moot," it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss. E.g., *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). The court below, however, properly concluded (Pet. App. 7a n.4) that despite the mootness of the *Wheat* adjudications, *Corpus Christi II* is not moot. In addition to reaffirming the Commission's prior decisions in the *Wheat* cases, the Commission's decision in *Corpus Christi II* concluded a rulemaking proceeding that determines the common control standard that will apply for the future. Furthermore, it accomplished the vacation of the continuing port equalization orders in *Corpus Christi I*, thus depriving Corpus Christi interests of a former remedy by which to attack rail rate disparities. Accordingly, the court of appeals had for its consideration "actual matters in controversy essential to the decision of the particular case before it." *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920). In view of the continuing effects of the July 1980 decision, it was permissible for the court of appeals to review the Commission's decision in *Corpus Christi II*, and there are no grounds for arguing that the mootness of the *Wheat* cases necessitates an order directing that agency proceedings in those cases be vacated.

5. Finally, petitioner errs in asserting (Pet. 25) that this case raises broad questions of transportation law warranting this Court's review. The final Commission decision

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7a n.3) that the petition in No. 80-1843 "raises still viable issues," but it dismissed the three petitions that sought review of the *Wheat* cases. As a practical matter, it would have been difficult, if not impossible, for the court below to vacate the portions of the Commission's decision that are in fact moot. This is so because the *Corpus Christi II* decision decided both the moot *Wheat* cases and the viable *Corpus Christi I* cases on reopening.

involved here was issued before enactment of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, and review in the court of appeals was under the old law (see Pet. App. 3a). However, the Staggers Rail Act will apply in any future discrimination cases involving ports,[18] and petitioner (and any other aggrieved parties) will have the opportunity to challenge any proposed unequalized rates to Corpus Christi on grounds of discrimination at such time as they are proposed.[19] Consequently, this case merely marks the conclusion of an old era in discrimination law. It cannot be said to present legal issues that are of broad general importance today.

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[18]Although the Staggers Rail Act did not specifically amend the discrimination statute as it applies to ports, 49 U.S.C. (Supp. IV) 10741(b), the legislative history indicates that the Commission is "to exercise its remaining power under section 10741 only where it is needed to prevent abuses of market power where discrimination cannot be justified by differences in demand for services or costs." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 104 (1980). Adoption of the actual control standard which looks closely at the facts and circumstances of each particular case and only permits the Commission to find a violation of the Act if a carrier or group of carriers is actually responsible for the rates to both ports is clearly in keeping with congressional intent.

[19]As noted above, rates to Corpus Christi have been equal to those charged to the other Texas ports since 1978, when MoPac voluntarily concurred in reduced joint rates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-341

IN THE

Supreme Court of the United States

October Term, 1982

NUECES COUNTY NAVIGATION DISTRICT NO. 1,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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234-7233 — Baker Publishing Co., 207 E. 4th St., St. Paul, Minn. 55101 — 234-7233

QUESTIONS PRESENTED

1. Did the Interstate Commerce Commission err in vacating its previous orders issued in 1954 and 1961 which were based on the facts that existed at those times and which found that certain rates were unduly prejudicial to Corpus Christi, Texas?

2. Did the Interstate Commerce Commission err in vacating its 1954 and 1961 orders based on a new test of what constitutes control of joint rates?

3. Did the Interstate Commerce Commission err in adopting a policy of refusing to prescribe rates under 49 U.S.C. 10741(b) where no control existed under its new policy and no other provisions of the Interstate Commerce Act were violated?

4. Did the Interstate Commerce Commission, where it found no control by the origin carrier under its new policy, err in finding that there was no failure by the origin carrier to agree on how to divide the revenues produced by the proposed joint rates?

5. Did the Court of Appeals err in holding issues raised by three of the petitions before it for review were moot, and after so holding in refusing to remand the proceedings to the Interstate Commerce Commission with instructions to dismiss?

ALPHABETICAL LIST OF PARTIES

Bunge Corporation, intervenor in support of petitioner below not a party here.

Burlington Northern Railroad Company, as the successor in interest to the St. Louis-San Francisco Railway Company on November 21, 1980, intervenor in support of respondents below and respondent here.

Interstate Commerce Commission, respondent below and respondent here.

Louis Dreyfus Corporation, intervenor in support of petitioner below not a party here.

Missouri Pacific Railroad Company, special appearance below, respondent here.

Nueces County Navigation District No. 1, petitioner below and petitioner here.

Producers Grain Corporation, petitioner below not a party here.

Southern Pacific Transportation Company, The Atchison, Topeka and Santa Fe Railway Company, and Houston Port Bureau, Inc., intervenors in support of respondents below and respondents here.

United States of America, respondent below and respondent here.

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OPINION BELOW AND JURISDICTION

The petitioner has for the purposes of the petition for a writ of certiorari accurately set forth the opinions of the Interstate Commerce Commission and the Circuit Court of Appeals for the Fifth Circuit.

The petitioner has accurately set forth the basis of the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

The petitioner has accurately set forth in Appendix H of the Appendix which accompanied the petition for a writ of certiorari the particular statutory provisions involved.

STATEMENT OF THE CASE

The case before this Court involves three decisions of the Interstate Commerce Commission concerning the publication of reduced rates on wheat from ten origins in Oklahoma and two origins in Kansas to Galveston and Houston, Texas, but not to Corpus Christi, Texas, and one decision of the Commission vacating two earlier decisions of the Commission concerning Corpus Christi, Texas. The first three decisions will be referred to herein as the *Wheat* case and the fourth decision will be referred to herein as the *Corpus Christi* case.

By a tariff item scheduled to become effective on February 20, 1977, the St. Louis-San Francisco Railway Company (Frisco)[1] which served the origins and the Fort Worth and Denver Railway Company (FWD) and the Missouri-Kansas-Texas Railroad Company (MKT) which serve various Texas ports joined in the publication and filing with the Commission of reduced carload rates on wheat to Galveston and Houston, but not to Corpus Christi, at levels from one to three and one-half cents per 100 pounds below the former rates. The reduced rates were not at first published to Corpus Christi because the Missouri Pacific Railroad Company (MP) and the Southern Pacific Transportation Company (SP) (the rail carriers which reach Corpus Christi) refused to concur in reduced rates to that port.

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[1] The Frisco was merged into the Burlington Northern Railroad Company on November 21, 1980, but since the term "Frisco" was used throughout the case when it was before the Interstate Commerce Commission and in the brief filed in the Circuit Court of Appeals for the Fifth Circuit, that term will be used herein.

Verified complaints and requests for suspension alleging unlawfulness in violation of the Interstate Commerce Act[2] for failure to publish the same reduced rates to Corpus Christi were filed by Louis Dreyfus Corporation ("Dreyfus"), Nueces County Navigation District No. 1 ("Nueces"), and Producers Grain Corporation ("Producers"), hereinafter collectively referred to as the Corpus Christi interests. The Houston Port Bureau and the Frisco on its own behalf and on behalf of other railroads which were parties to the reduced rates filed replies to the verified complaints and requests for suspension. The Suspension and Fourth Section Board of the Commission concluded not to suspend the proposed rates but, by order dated February 16, 1977, it entered into an investigation thereof. Thus, the rates became effective as scheduled.[3] The proceeding was assigned by the Commission to be handled under a no-oral hearing procedure known as the modified procedure. The evidence of the Frisco on behalf of all carriers participating in the reduced rates was included in statements of fact and argument and in reply statements of fact and argument submitted in accordance with the rules applying to modified procedure. The Houston Port Bureau and Union Equity Co-Operative (which had intervened in support of the

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[2] The allegation was that the proposed rates were unduly prejudicial to Corpus Christi and unduly preferential to other Texas ports in violation of Section 3(1) of the Interstate Commerce Act (Act). The entire Act has been recodified without substantive change and now is set forth in 49 U.S.C. 10101, *et seq.* The term "unreasonable discrimination" is now used in lieu of the terms undue prejudice and undue preference. The recodified section concerning unreasonable discrimination is 49 U.S.C. 10741(b).

[3] Except for general rate increases which have since been applied and except for the fact that comparable rates have been published to Corpus Christi, basically no changes have occurred in the rates to the Texas ports in the 69 months since the reduced rates became effective.

reduced rates) filed opening statements in support of the Frisco.

On April 15, 1977, or about 45 days subsequent to the order directing that modified procedure be observed, Nueces filed a motion requesting the Commission to:

"1. Broaden the investigation to include the Missouri Pacific Railroad Company (MoPac) and the Southern Pacific Transportation Company (SP) as respondents;

2. Promptly set the proceeding for oral hearing in Washington, D.C.; and

3. Direct the Frisco, MoPac, and SP to have present at such oral hearing one, or more, competent witness to testify on direct and cross-examination exactly what efforts have been made to publish comparable reduced rates to Corpus Christi, Texas, and why those efforts have not been successful."

Frisco filed a reply to the motion in a pleading dated April 26, 1977. Opening statements of facts and argument were filed with the Commission by the Corpus Christi interests on April 27, 1977.

In a decision dated August 4, 1977, the Commission ordered:

"That this investigation be, and it is hereby, broadened into and concerning the lawfulness of the rates, charges, rules, regulations, and practices contained in schedules published by or for the accounts of the St. Louis-San Francisco Railway Company and its connections with Missouri Pacific Railroad Company and Southern Pacific Transportation Company and their movements of wheat for export, in carloads, from the issue origins to Corpus Christi, Texas."

"That this investigation be, and it is hereby, broadened with a view of making such findings and orders in the premise as the facts and circumstances shall warrant. In the event the said schedules are changed, amended or reissued, such change, amended or reissued schedules will be included in this investigation.

That the St. Louis-San Francisco Railway Company, Missouri Pacific Railroad Company, and the Southern Pacific Transportation Company may under modified procedure file statements of position and evidence on or before 10 days from service of this order. In view of the time constraints that govern this proceeding, reply statements are not contemplated."

In accordance with the last cited ordering paragraph above, Frisco filed a statement of position on August 22, 1977. On or about August 26, 1977, the Corpus Christi interests filed a petition seeking a right to file a reply statement—a right which was not accorded or contemplated by the Commission's August 4, 1977 decision.

In an order dated September 8, 1977, the Commission set forth comments with respect to the proceeding. In that order, the Commission said:

"In situations where one railroad serves one port directly and the other port by joint service with a second railroad, this Commission has stated that a carrier does not have common control if it offers to establish equivalent service at equivalent rates, but the connecting carrier declines. *Corn & Soybeans, Midwest to Gulf Ports*, 349 ICC 1, 4 (1974). Evidence in the present case indicates that the originating carrier requested concurrences from other carriers, some of which concurred while others did not. Accordingly, we are no longer satisfied that offers of

divisions by originating carriers are sufficient by themselves to demonstrate a willingness to provide equivalent service at equivalent rates, unless it is clearly and convincingly shown by the carriers that these efforts were made in good faith.

Without such a showing, the originating carrier may predicate the lower joint rate upon a division of revenues which substantially reduces the share of the connecting carrier or carriers. By so doing, the origin carrier could virtually compel the non-concurrence of the connecting carriers.

In order to establish that it has made good faith offers of divisions with the non-concurring railroads, respondent should submit evidence showing: (1) the amount and proportion of the offer of divisions in the case at issue; (2) the amount and proportion of the established basis of divisions, if any, on the particular commodity and over the particular route; and (3) the amount and proportion of the established basis of divisions on identical or comparable commodities over identical or comparable routes. Respondent may also submit any other evidence, including cost data, to support its case."

The above September 8, 1977 order of the Commission also established due dates for additional pleadings. SP filed an opening statement of facts and argument. Frisco filed a second opening statement of facts and argument and submitted the evidence as required by (1), (2), and (3) in the above quotation. The Corpus Christi interests also filed second opening statements to which Frisco replied.

In a decision *Wheat, Oklahoma, and Kansas to Texas Gulf Ports (First Wheat)*, dated December 19, 1977, 357 ICC 382

(1977), the entire Commission found the proposed rates not to be unduly prejudicial to Corpus Christi, not unduly preferential to other Texas ports or otherwise unlawful (Pet. App. B).[4] Various petitions for administrative review were filed by the petitioners with the Commission and after denials, an action was initiated in the Circuit Court of Appeals for the Fifth Circuit challenging the Commission's decision. SP and Frisco intervened as respondents in that action (78-1348).

Frisco did not originally file replies to the petitions for administrative review directed to the *First Wheat* decision which petitions were filed by the Corpus Christi interests with the Commission because, effective February 22, 1978, it was able, with the MP's concurrence, to publish the reduced rates to Corpus Christi and the matter of concern of the Corpus Christi interests became moot. Thereafter, the Frisco requested that the proceeding be discontinued, but reserved the right, in the event its request was denied, to file replies to the various petitions for administrative review. Thereafter, the Corpus Christi interests agreed that the proceeding be discontinued, but only if the decision of the Commission in *First Wheat* was vacated.

The matter remained dormant until an order, dated June 20, 1978, was released by the Commission. This order denied Frisco's request to discontinue, but did authorize replies to the petitions for administrative review. Frisco and SP both filed replies. Subsequent to receipt of the June 20, 1978 decision, the Corpus Christi interests filed a petition with the Commission seeking a limited further hearing and related relief, and Frisco and SP replied. In a second decision (*Second*

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[4] The reference is to an appendice found in a separate volume filed by petitioner. The specific appendix to which reference is made is cited as "Pet. App. ——".

Wheat) dated February 2, 1979, 359 ICC 542 (1979), (Pet. App. C), the Commission affirmed its December 19, 1977 decision in *First Wheat*. In the *Second Wheat* decision, the Commission thoroughly discussed *Nueces County Nav. District No. 1 v. Obilene & S. Ry. Co.*, 291 ICC 459 (1954) and *Nueces County Nav. Dist. No. 1 v. Atchison, Topeka & Santa Fe Railway Co.*, 315 ICC 155 (1961), (*Corpus Christi* cases) and how the control circumstance should be viewed with respect to the facts involved in the matter before it in the *Wheat* case. The Commission also announced that the "Corpus Christi cases will be reopened to determine whether these decisions are consistent with the action taken here." On or about April 4, 1979, the Corpus Christi interests instituted a second appeal in the Circuit Court of Appeals for the Fifth Circuit with respect to the Commission's *Second Wheat* decision (79-1816). Opening briefs were filed by various parties with the Circuit Court of Appeals for the Fifth Circuit in both 78-1348 and 79-1816.

Subsequent to the filing of the briefs with the Circuit Court, the Commission by a notice released on November 15, 1979, reopened the *Corpus Christi* cases and upon approval of the Circuit Court also reopened the *Wheat* proceeding (i.e., to reconsider the *First Wheat* and *Second Wheat* decisions) for further consideration. Comments were solicited by the Commission with respect to the *Corpus Christi* cases inviting particular comment as to whether the port equalization orders entered in the *Corpus Christi* cases should be modified. Comments were filed by many of the nation's railroads (including separate comments by the Burlington Northern Railroad Company and the Frisco), by port interests, and by shippers. In a decision dated July 21, 1980 which embraced the two *Corpus Christi* cases and the *Wheat* case (Pet. App. D), the Commis-

sion found that under a proper interpretation of the Interstate Commerce Act, actual control and not network control is the proper standard to establish common source of unreasonable discrimination under 49 U.S.C. 10741(b) and that the good faith test of an offer of divisions may be utilized to prove that no actual control existed. The Commission thus modified its earlier findings in the *Corpus Christi* cases. The July 21, 1980 decision of the Commission also affirmed its earlier decisions in *First Wheat* and *Second Wheat*.

The Corpus Christi interests filed (1) an appeal attacking the Commission's third decision in *Wheat*, and (2) an appeal attacking the Commission's action in the *Corpus Christi* cases in the Circuit Court of Appeals for the Fifth Circuit which appeals were docketed as 80-1842 and 80-1843, respectively. Requests for a stay of the Commission's July 21, 1980 decision pending review were denied by the Commission. A motion to consolidate all appeals was granted, and all four appeals (Nos. 78-1348, 79-1816, 80-1842 and 80-1843) were handled in one decision by the Circuit Court of Appeals for the Fifth Circuit (Pet. App. A). It is to the decision of the Circuit Court of Appeals for the Fifth Circuit that petitioner has directed its petition for a writ of certiorari to which the instant brief is in opposition.

SUMMARY OF ARGUMENT

The facts before the Commission in the *Wheat* case are vastly different than those before the Commission in the *Corpus Christi* cases. Frisco, in the reduced rate actions it took on wheat which lead to the decisions of the Commission in the *Wheat* case, simply was attempting to protect the traffic moving to Galveston and Houston from diversion to other carriers which diversion was not occurring on the wheat traf-

fic moving to Corpus Christi. Frisco by taking most of the reduction in the rates out of its share of the joint revenues acted in good faith and therefore did not actually control the rates. No disagreement as to divisions existed. Absent control unreasonable discrimination under 49 U.S.C. 10741(b) cannot be found and unless other sections of the Interstate Commerce Act are violated, the Commission cannot prescribe rates. It makes no difference whether the Court of Appeals dismissed the appeal in the *Wheat* case because of mootness or the Court of Appeals remanded the *Wheat* case to the Commission with directions to dismiss.

ARGUMENT

Since it was Frisco's rate actions which precipitated the controversy which resulted in the action which is now before this Court, Frisco's argument herein will concentrate on the rate consequences or lack thereof which result from the Commission's approval of those actions. It is understood that the United States and the Commission in their joint brief will set forth arguments and cite supporting decisions which review the presumption of the correctness of orders and decisions of the Commission, the scope of review, the adequate findings and substantial evidence rules and the assumed expertise of the Commission with respect to the complex matters at issue. In the interest of brevity, those arguments will not be repeated here. Those arguments are adopted without qualification by Frisco for the purposes of this brief in opposition to the petition for a writ of certiorari.

The earlier review of the history of the proceedings before the Commission, which led to the three decisions of the Commission in *Wheat* demonstrates that the Commission's han-

dling of the matter has been extensive and that the petitioner had every opportunity to demonstrate that Frisco's action would result in injury to interests at Corpus Christi. The evidence of Frisco in the *Wheat* case before the Commission is materially different than the evidence which was before the Commission in the 1954 and 1961 *Corpus Christi* proceedings. The principal differences between the *Wheat* case and the earlier *Corpus Christi* cases are that: (1) carrier competition to Galveston and Houston is now different than to Corpus Christi; (2) only twelve origins are involved in *Wheat* whereas hundreds of origins were involved in the earlier *Corpus Christi* cases; and (3) the distance to Corpus Christi from the involved origins is about 250 miles greater and accordingly the costs to Corpus Christi are higher than to Galveston and Houston. The petitioner, however, did nothing to demonstrate that such differences were not material and that rates higher to Corpus Christi than to Galveston and Houston were not permissible. It chose to ignore these important aspects of the case and instead placed its entire reliance on the previous actions of the Commission in the *Corpus Christi* cases.

Frisco was a relatively small (but profitable) midwestern rail carrier which simply recognized that it could not sit idly by and watch its traffic get away. It sought opportunities to meet competitive circumstances as they occurred rather than wait until its traffic has been diverted away before taking corrective steps. The matter considered by the Commission in *Wheat* is an example of the action that Frisco on occasion has been required to take in order to protect its traffic.

Frisco recognizing that it was being faced with competitive actions of others that conceivably could have resulted in the

wheat traffic in which it was participating in the movement to the ports of Galveston and Houston being diverted from it, offered to publish reduced rates which were designed to meet the competition caused by reductions in rates on wheat made by certain rail carriers and by regulated and exempt motor carriers to Galveston and Houston. Frisco's offer included a willingness to join in the publication of reduced rates which would be identical to all Texas ports, including Corpus Christi, even though the same competition did not exist at Corpus Christi as existed to Galveston and Houston and even though the distances and costs were greater to Corpus Christi than to Galveston and Houston. Concurrences came from FWD and MKT, rail carriers serving Galveston and Houston, but none came from the MP and SP which serve Corpus Christi.[5]

In its evidence before the Commission, the Corpus Christi interests either ignored or attempted to disparage by argument, the testimony of the Frisco concerning the competition it faced with respect to the involved traffic to Galveston and Houston. No witness took the position that Frisco's evidence was inaccurate. Neither did the Corpus Christi interests attempt to show that its disadvantages with respect to greater distances and higher costs for rail services were not items the railroads were entitled to take in consideration in the publication of rates.

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[5] Frisco continued to hold itself out to join with any rail carriers serving Texas ports in the publication of the identical rates as those involved in the proceeding before the Commission. MP extended its concurrence with respect to Corpus Christi, and the reduced rates to Corpus Christi became effective on February 22, 1978. Frisco assumed virtually all of the reduction in the rates from its share of the joint revenues, i.e., MP and SP were not requested to give up any significant amount of the revenues that they were receiving from the higher rates.

Petitioner has done no more in its petition for a writ of certiorari than what it did before the Commission. That is, it has done nothing but set forth arguments which are not supported by any facts. Petitioner raises four principal points as the reasons the petition for writ of certiorari should be granted. None of these points raise any adequate reason why this Court should take that action.

Petitioner's first point is that the decisions below conflict with decisions of this Court. This is error. The decisions of the Commission in the *Wheat* case and the modification of the Commission's earlier orders in the *Corpus Christi* cases were actions which are adequately supported by the facts of the case, by the Interstate Commerce Act, and by decisions of the Commission, of lower appellate courts and of this Court. The Commission simply found on the basis of the evidence before it that its former concept of control, which is a necessary element for it to find unjust discrimination under 49 U.S.C. 10741(b) (formerly undue preference and prejudice under 49 U.S.C. 3(1)), was not correct when the proponent carrier did not reach either the alleged preferred points or the alleged prejudiced points and when the proponent carrier treated its rail carrier connections that did reach the alleged preferred and prejudiced points with no difference.

As was stated earlier, only the Frisco reached the origins, the MKT and FWD reach Galveston and Houston, and the MP and SP reach Corpus Christi. It was also stated earlier that Frisco offered to absorb the rate reductions from what would be its share of the joint rates, and that MKT and the FWD agreed, but MP and SP did not. Therefore, substantially all of the reduced revenues came from the Frisco's share of the joint rates.

Thus, Frisco did all it could to maintain equal rates to all Texas ports. It simply did not have enough partners to cover all ports. It cannot be questioned that Frisco's willingness to take virtually all of the reduction in revenues from its share of the joint rates demonstrated that it was acting in good faith in its offer to its rail connections.

The competition which Frisco and the Galveston and Houston railroads faced was pervasive, and such competition had to be met with competitive rates, otherwise they would have foregone the opportunity to continue participating in any of the movement of the wheat traffic to those ports. If Frisco had taken no action to reduce the rail rates on wheat to Galveston and Houston because it could not get concurrences to publish the same reduced rates to Corpus Christi all of the wheat traffic would ultimately have gravitated to the motor carriers serving Galveston and Houston, and Corpus Christi could not possibly have gained from having equal but higher rail rates with Galveston and Houston. Galveston and Houston simply would have received its wheat movements by use of motor carriers, and Corpus Christi which does not have the same motor carrier competition from the involved origins would not have been benefitted. Corpus Christi has never even attempted to justify such an illogical position. It has sought equality of treatment without a demonstration that the competition, distance and cost were the same. Equality of treatment at the former higher rail rates Galveston and Houston *vis a vis* Corpus Christi would not have helped Corpus Christi, but would have substantially damaged Frisco.

Petitioner next asserts that it was incorrect for the Commission to have concluded that absent control of both the alleged preferred rate and the alleged prejudiced rate, a rate would not be prescribed unless there is some other violation

of the Interstate Commerce Act. The Commission's conclusion was not erroneous.

Over the period of the existence of unlawfulness based on undue preference and undue prejudice (now unreasonable discrimination) the Commission has required the showing of four elements, namely:[6]

1. That rate disparity existed between the alleged preferred points and the alleged prejudiced points,
2. That injury occurs to the alleged prejudiced points,
3. That a carrier or group of carriers controls the rates to both the alleged preferred points and the alleged prejudiced points, and
4. That different transportation conditions did not exist between the points to justify the difference in treatment.[7]

The control element is an essential ingredient to a finding of unlawfulness under 49 U.S.C. 10741(b). Absent a finding of control, unreasonable discrimination cannot exist, and if the assailed rates are to be found unlawful such result must be accomplished under sections of the Interstate Commerce Act other than 49 U.S.C. 10741(b). This is so fundamental that little comment is warranted. All crimes, and civil wrongs have their essential elements and a failure of the proof of a

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[6] See *Chicago Board of Trade v. Illinois Central R.R.*, 344 ICC 818, 840 (1973) aff'd sub nom, *Chicago, E.I.R.R. v. United States*, 384 F.Supp. 298 (N.D. Ill. 1974), and aff'd mem. 421 U.S. 956 (1975).

[7] Although the Commission could have found that the transportation conditions with respect to the movements to Galveston and Houston were different from those involving Corpus Christi because of competition existing to Galveston and Houston and less distance and lower cost to Galveston and Houston than to Corpus Christi, it did not do so. Instead, it based its findings on the lack of common control.

single element prevents a finding that the crime or civil wrong was committed. If the defendant is to be made to pay, it cannot be for the crime or civil wrong which was not proven, it must be for another crime or civil wrong that is proven. Thus petitioner having failed to prove a common control prevented the Commission from prescribing a rate under the unreasonable discrimination prohibition provisions of the Interstate Commerce Act. Accordingly, no prescription of rates can be accomplished by the Commission unless a violation of another section of the Interstate Commerce Act has occurred. The teachings of this Court in *State of New York v. United States*, 331 U.S. 284 (1947) and *Ayrshire Collieries Corporation v. United States*, 335 U.S. 573 (1948) make this abundantly clear. Thus, if no unreasonable discrimination exists, rates in order to be found unlawful must be found to be in violation of other sections of the Interstate Commerce Act. No parties opposing Frisco's action in the proceeding before the Commission raised any issues or submitted any evidence that could be considered in relation to any section of the Interstate Commerce Act except 49 U.S.C. 10741(b).

Petitioner next argues that the Commission permitted the reduced rates to be published to Corpus Christi because of a disagreement between the carriers as to the divisions of the joint rates. There is no evidence in the record to support that argument. The evidence in the records is directly contrary. The record is replete with evidence that Frisco agreed to take virtually the entire reduction in the rates from its divisions of the proposed joint rates to any Texas port. That is, Frisco connections would fare as well from a total revenue standpoint under the reduced rates as under the higher rates. There never has been a disagreement as to divisions. The proof of this fact is no reduction in revenues resulted to

FWD or MKT when they originaliy concurred in the reduced rates to Galveston and Houston and none resulted to MP when it ultimately concurred in the reduced rates to Corpus Christi.

The Commission's only concern with divisions in the instant matter was to determine whether Frisco made a good faith offer to its connections. The Commission found that based on Frisco's offer to take the reductions in the reduced rates from its share of the joint revenues that Frisco had made a good faith offer. In no manner (and properly so) did the Commission conclude that there was a controversy as to divisions and that such controversy justified the failure to publish the reduced rates to Corpus Christi.

The petitioner next argues that the Commission has reinterpreted the anti-discrimination provisions of the Act in its decisions in the *Wheat* case and the *Corpus Christi* cases, and that the Court of Appeals was wrong in approving the Commission's action. Again, petitioner is in error. The Act prohibits unreasonable discrimination and nothing the Commission or the Court of Appeals did has changed that. The wrong of unreasonable discrimination can always be proven if facts are introduced meeting the four previously discussed elements of that wrong. All the Commission did was to find that one carrier of a joint service does not control that joint service unless that carrier does not act in good faith in its dealings with the other participants in the joint services. Were the Frisco in the circumstances here challenged to have proposed reduced rates to the various Texas ports and agreed to reduce its divisions on the rates applicable to Galveston and Houston, but refused to reduce its divisions on the rates applicable to Corpus Christi where Frisco's services were

identical, conceivably Frisco would be charged with bad faith and, in effect, would be controlling the rates to Corpus Christi. However, that is the reverse of what actually occurred. Frisco agreed to treat all railroad connections alike. The petitioner is in error in saying that the Commission has changed its interpretation of the Act.

Petitioner's last point is that the Court of Appeals was in error in finding that the appeals in the *Wheat* case were moot, but if that court was correct in that regard, it should not have dismissed the petitions for review, but instead should have remanded the cases to the I.C.C. with directions to dismiss. It seems unbelievable that petitioner would raise a point which has no significance. It makes no difference whatsoever if the Court of Appeals had remanded with directions to dismiss or merely took direct action itself and dismissed the appeals. The same end is reached. The Court should not grant a petition for a writ of certiorari simply to direct the Court of Appeals to remand a matter to the Commission to dismiss as moot when that result would be no different than what the Court of Appeals itself accomplished by dismissing the appeals in the *Wheat* case as moot.

CONCLUSION

The petitioner has not set forth any valid reasons for this Court to grant the petition for a writ of certiorari. The petitioner has had almost six years to prove that the Frisco did not act in accordance with the anti-discrimination provisions of the Interstate Commerce Act in publishing the reduced rates involved in *Wheat*. It has not yet been able to have the Commission in its three decisions in the matter or the Court of Appeals in its two decisions (opinion and denial of motion for rehearing) agree with the positions it has advanced. Nor has the petitioner set forth any valid reasons why the Commission erred in utilizing the test of actual control rather than the previously utilized test of network control established in the *Corpus Christi* cases for one portion of the proof required to demonstrate unreasonable discrimination. This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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NO. 82-341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NUECES COUNTY NAVIGATION DISTRICT NO. 1,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1) Did the Interstate Commerce Commission err in refusing to prescribe rates where (i) there was no showing of common control of rates, a prerequisite to a finding of rate discrimination under 49 U.S.C. § 10741(b), and where (ii) there was no showing of violation of some other aspect of the Interstate Commerce Act?

2) Is there reversible error in the Fifth Circuit's failure to remand certain of the Interstate Commerce Commission orders after finding them moot?

ALPHABETICAL LIST OF PARTIES

Bunge Corporation; intervenor in support of petitioner below; not a party here.

Burlington Northern Railroad Company, as the successor in interest to the St. Louis-San Francisco Railway Company on November 21, 1980; intervenor in support of respondents below and respondent here.

Interstate Commerce Commission; respondent below and respondent here.

Louis Dreyfus Corporation; intervenor in support of petitioner below; not a party here.

Missouri Pacific Railroad Company; special appearance below; respondent here.

Nueces County Navigation District No. 1; petitioner below and petitioner here.

Producers Grain Corporation; petitioner below; not a party here.

Southern Pacific Transportation Company, The Atchison, Topeka and Santa Fe Railway Company, and Houston Port Bureau, Inc.; intervenors in support of respondents below and respondents here.

United States of America; respondent below and respondent here.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW AND JURISDICTION

The petitioner has for the purposes of the petition for a writ of certiorari accurately set forth the subject opinions of the Interstate Commerce Commission and the United States Court of Appeals for the Fifth Circuit.

The petitioner has accurately set forth the basis of the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

The petitioner has accurately set forth the involved statutory provisions in Petitioner's Appendix H.

STATEMENT OF FACTS

In its opening statement before the ICC in this rate case, the St. Louis-San Francisco Railway Co. (hereinafter referred to as "Frisco") defended its reduced rates by arguing that they were compelled by motor carrier and rail competition, and that Frisco was willing to extend the rates to Corpus Christi, but that it had been unable, thus far, to obtain the concurrence of the two railroads[1] serving Corpus Christi. Nueces County Navigation District and Dreyfus contested these matters, arguing that Frisco did have control over the rates to Corpus Christi as well as to Houston and that the reduced rates to Houston were in violation of Section 3(1) [49 U.S.C. § 10741].[2] When the Commission issued its order of September 8, 1977, calling for the Frisco to produce evidence showing "that it has made good faith offers of divisions with non-concurring railroads", it became obvious that the issue of whether Frisco had actual control over the subject rates to Corpus

1. The two railroads serving Corpus Christi from points north are the Missouri Pacific Railroad Co. and the Southern Pacific Transportation Co., hereinafter referred to as "MP" and "SP" respectively.

2. Section 3(1) of the Interstate Commerce Act prohibited "undue preference and prejudice" between person, ports, localities, etc., caused by a carrier. Section 3(1) has been recodified and the "preference and prejudice" language of the former Section 3(1) has been replaced so that now a common carrier "may not subject a person, place, port, or type of traffic to unreasonable discrimination." The recodification, enacted on October 17, 1978, stated as its purpose that it was "to revise, codify, and enact without substantive change the Interstate Commerce Act and related laws as Subtitle IV of Title 49, United States Code 'Transportation' ". Public Law 95-473, 95th Congress, Second Session; 92 Stat. 1337; 49 U.S.C. Sections 101, et seq. References herein will be to Section 10741 of Title 49, rather than to Section 3(1) of the old Interstate Commerce Act.

Christi, and whether it had made an offer to provide equivalent service for equivalent rates, in good faith, was paramount in the Commission's consideration of this case.

The Commission's first decision in this case, referred to herein as *Wheat I*, thoroughly reviewed the evidence offered by all parties, and it included a discussion of the cost of service evidence as it related to the issue of whether the Frisco had made a "good faith" offer of divisions in attempting to obtain the concurrence of SP and MP to establish the reduced rate to Corpus Christi. (Pet. App. p. 28a) The decision concluded ultimately that even though the revenues involved to Corpus Christi "could most accurately be described as marginally compensatory", the evidence as a whole showed that Frisco sustained its burden of proving that its division offers were made in good faith and that it, therefore, lacked common control over the rates to Corpus Christi. (Pet. App. pp. 54a-56a)

The ICC subsequently reopened the proceeding and issued its decision referred to herein as *Wheat II* (Pet. App. p. 66a) which further expounded upon the Commission's analysis of the evidence necessary to show a lack of common control over the rates and concluded that the "good faith offer of divisions" was an appropriate test to determine whether Frisco exercised common control. *Wheat II* affirmed the Commission's ruling in *Wheat I* that the reduced rates were not shown to be in violation of Section 3(1) of the Act [49 U.S.C. § 10741].

Nueces County Navigation District No. 1 and Dreyfus appealed to the Fifth Circuit the ICC's decision in

Wheat I and *Wheat II* arguing, *inter alia*, that they were contrary to older ICC cases involving equalization of certain railroad grain rates to Corpus Christi and certain other Gulf ports. Said older "Corpus Christi Port Equalization Cases" had concluded that SP and MP "together with the other carriers which served the Texas ports, acting in conjunction with the originating lines in the origin territory, directly and effectively controlled the rates to all such ports." ICC No. 31098, *Nueces County Navigation District No. 1 v. Abilene and Southern Railway Co., et al.*, 291 ICC 459, 470 (1954). See also ICC No. 33447, *Nueces County Navigation District No. 1 v. Atchison, Topeka & Santa Fe Railway Company, et al.*, 315 ICC 155, 163 (1961).[3] With approval from the Fifth Circuit, the ICC reopened the *Corpus Christi* cases for reconsideration.

The *Corpus Christi* cases involved alleged violations of Section 3(1) of the Act [49 U.S.C. § 10741], and the Commission opinions in each of the cases recite in detail the various arguments made concerning rate comparisons and the comparability of transportation circumstances to and between the allegedly preferred and prejudiced ports. However, each of the decisions contains no real discussion as to the rationale behind the conclusion that the rail carriers control the rates in question. Rather, the ICC's rulings therein that the carriers exercised a network of common control appears to have been largely based on presumption. Indeed, in its order of

3. Respondents note that Petitioner's Appendix has not included the text of the ICC decisions in the Corpus Christi Port Equalization Orders, but has included only the ordering language itself in its Appendices E and F (Pet. App. pp. 110a, 112a). Reference to the ICC Reporter citations above will allow review of the text of the decisions, if necessary. These ICC decisions are referred to hereinafter as the "*Corpus Christi*" cases.

November 15, 1979, reopening the *Corpus Christi* cases, the ICC advised the public that "in the Corpus Christi cases, this Commission presumed common control because the carriers acted as a network, as indicated by both the carriers' joint participation in the rates and their points of track intersection." In said order, the Commission duly advised the public that the earlier *Corpus Christi* cases were based upon a presumption of control, and that the Commission was considering abandoning such presumption, requiring instead in future cases proof of actual control over the joint rates.

Having announced its intentions and calling for comments in the change of policy envisioned in the Commission's reopening of the *Corpus Christi* cases, the Commission handled the reopened cases in accordance with customary procedure and law pertaining to such an exercise of its rulemaking authority. The decision in the reopened *Corpus Christi* cases duly recites the concerns voiced by the parties filing comments, and it contains a reasoned explanation of the change in policy announced by the Commission with respect to cancellation of the port equalization orders at Corpus Christi. (Pet. App. p. 92a) The change in policy adopted by the Commission was to abandon its earlier presumption of "network common control" of rates by railroads, and to substitute a requirement that future rate discrimination cases include proof of actual control of rates. (Pet. App. p. 99a).

SUMMARY OF ARGUMENT

The technical argument of Petitioner that the common control standard is irrelevant in a Section 10741 rate discrimination inquiry because the Commission should have prescribed reduced rates to Corpus Christi is an

argument based upon an erroneous interpretation of law. This Court's decisions in *Ayrshire, infra,* and *New York, infra,* are distinguishable from the instant case in that there the ICC had under consideration issues of reasonableness of rates. Here, where Petitioners failed to prove with substantial evidence that the existing higher rates to Corpus Christi were in excess of a maximum reasonable level, the Commission properly refused to prescribe lower rates. It was not arbitrary nor an abuse of discretion for the Commission to have declined to prescribe rates where Petitioners, having failed to prove a violation of Section 10741, also failed to show any other violation of the Interstate Commerce Act.

ARGUMENT

Petitioner's primary argument is that the ICC has erred in ruling below that "a rate cannot be prescribed absent common control unless there is some other violation of the act". (Pet. App. 106a) Petitioner's argument confuses the ICC's authority to prescribe rates, by failing to clarify that the basic issue before the ICC in this case was whether or not the reduced rate violated the "unreasonable discrimination" standard set forth in 49 U.S.C. § 10741(b). The *Wheat* cases did not involve any serious claim of an unreasonable level of rates, and the ICC found that "the evidence of record, including cost evidence relating to through movements, amply demonstrates that the present and proposed rates are just and reasonable." (Pet. App. 56a) It is vital to recognize that the subject ICC decision was a "discrimination case" rather than a "rate reasonableness case" because the authorities relied upon by Petitioner, in which this Court approved ICC prescription of rates, are distinguishable in that they did not involve solely the discrimination issue.

The Common Control Concept

Petitioner commences its argument by claiming false reliance by the ICC and the Fifth Circuit upon *Central R.R. Co. of New Jersey v. United States*, 257 U.S. 247, 259 (1921). Respondents confirm the language quoted by Petitioner but take issue with the statement that the excerpt provided by the ICC and the court below causes a distortion of the true meaning of the opinion in *Central R.R. Co.* In fact, further reading of the opinion suggests that the distortion lies more in the quotation provided by Petitioner. To complete the train of thought begun in the sentence quoted at Petitioner's page 9 requires further reading, to-wit:

> They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination, as where a lower joint rate is given to one locality than to another similarly situated. If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity and local privileges and practices, or the cancellation of all joint rates, could afford the carriers the assurance that they were not in some way violating the provisions of Section 3. *Id.*

As can be seen from the more complete reading, the Court supports the view taken by Respondents herein that a carrier's culpability should not depend on the acts of its connecting carriers but rather should depend solely on its own acts.

Petitioner errs in its claim at page 14 of the Petition that in *Texas & Pacific Ry. Co. v. United States*, 289 U.S.

627 (1933) no mention is made of a carrier, or a group of carriers, having "control" over the rates. Rather, the Court states therein the following at 289 U.S. at 649:

> "Where . . . a carrier whose lines reach, or which *controls* the rate to, one of the destination, is a party to a joint rate to the other but cannot make or *control* the latter rate . . . it cannot be held responsible nor can any other to remove the prejudice run against it . . ." (Emphasis added)

The thrust of the decisions in *Central Railroad Company* and *Texas & Pacific, supra,* is that a connecting carrier must have some involvement, or some culpability, before the Commission can enter a "rate discrimination order" against it under § 10741. As pointed out by the ICC in *Wheat, I,* it is well established in "commerce law" that to support a violation of § 10741 there must be evidence of: (1) a disparity in rates, (2) actual or potential competitive injury to protestants, (3) common control of rates to both the preferred and prejudiced ports by the respondent carriers, and (4) comparability of transportation conditions at both the preferred and prejudiced ports. (Pet. App. 51a) This four part test was upheld in *Chicago & Eastern Illinois R. Co. v. United States,* 384 F.Supp. 298, 300-301 (N.D. Ill. 1974), aff'd 421 U.S. 956 (1975). The four part test, including the requirement of a showing of common control, has been used by the Commission for many years. See *Fresh Meats, Illinois . . . to Florida,* 318 ICC 5, 10 (1962); *Big River Industries, Inc. v. Aberdeen and Rockfish R.R. Co.,* 329 ICC 539, 541 (1967).

Petitioner argues that Congress was displeased by the holding in *Texas & Pacific,* noting that former Section

3(1) of the Act was amended after the decision. However, the changes in Section 3(1) in no way reflect on the matters from *Texas & Pacific* that are pertinent to the issues in the case at bar. The amendments merely broadened the scope of the discrimination prohibited by that section.

In attributing error to the analysis of the actual common control standard by the ICC and the Fifth Circuit, Petitioner relies heavily upon two Supreme Court cases which it interprets to *mandate* the issuance of a rate prescription order under the instant facts. However, these cases are distinguishable from the present controversy because neither involved the issue of port equalization and because in such cases the carriers were found to have violated another provision of the Act, hence establishing independent authority for the Commission's issuance of a rate prescription.

New York v. United States, 331 U.S. 284 (1947), involved an attempt to set aside interim orders of the Interstate Commerce Commission which either raised or lowered interstate class rates, depending upon the *territory* involved. In upholding the Commission's power to eliminate territorial discrimination under § 15(1) [49 U.S.C. § 10704], the Court stated:

> It may not be said in this case, as it was held in *Texas & Pacific R. Co. v. United States, supra,* p. 663, that there was no evidence of the unreasonableness of the rates, or that the question was not in issue. *The Commission here found that the rates were unjust and unreasonable under § 1 and it proceeded to fix new rates under § 15(1). The facts* which established that the differences in rates as between the several territories are not warranted by

territorial conditions *plainly sustain its finding under § 1. Id.*, at 343 (emphasis supplied)

It is clear from the above that Petitioner cannot properly rely upon *New York* to establish the Commission's authority to enter a former § 15(1) order [49 U.S.C. § 10704] to cure discrimination without a finding of common control or the existence of another violation of the Act. And, under no circumstance can *New York* be interpreted to require the Commission to issue a rate prescription in a rate discrimination case where at most only three of the four elements which historically have constituted a § 3(1) unreasonable discrimination violation at 49 U.S.C. § 10741 are present.

The other case which Petitioner alleges supports the Commission's ability to find a rate discrimination violation [49 U.S.C. § 10741] absent common control is *Ayrshire Corp. v. United States,* 335 U.S. 573 (1949). There the Court upheld Commission orders equalizing rail rates on bituminous coal from various midwestern origins This case is also distinguishable from the issues at hand because it involved the equalization of *group* rates and the Commission's orders were based upon the finding of a violation of former § 2 as well as § 3(1), both provisions now recodified at 49 U.S.C. § 10741.

Relying on *New York* and *Ayrshire,* Petitioner suggests that § 10704 of the Interstate Commerce Act is independent authority for the ICC to prescribe a rate to remedy a discrimination, regardless of whether such discrimination results from the actual control of the rates by the same carrier and without which a discrimination cannot be termed unreasonable. But as § 15(1) [now 49 U.S.C. § 10704] clearly indicated, the Commission's

power to prescribe a just and reasonable rate can only be exercised when a rate, fare, or charge "is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act."

The Commission's § 10704 authority over a rail carriers' rates is directly dependent upon the existence of a violation of some other provision of the Act. This obvious limitation was properly recognized by the Commission in its decision herein:

> "Section 10704 [§ 15(1)] is a remedial section of the act which provides for the prescription of maximum or minimum rates once there has been a violation of one of the substantive parts of the act. Unreasonable discrimination is such a substantive provision; common control is merely one of the case law developed criteria for a finding of unreasonable discrimination. Therefore, a rate cannot be prescribed absent common control unless there is some other violation of the Act." (Pet. App. 106a)

In challenging the above language of the ICC, Petitioners fail to recognize that where a complainant seeks a finding of unreasonable discrimination, the ICC will not hold the discrimination to be unreasonable in violation of the Act unless the challenged rates are under the actual common control of defendant carriers. The Commission has merely restated its position taken in numerous ICC cases that a discrimination cannot be "unreasonable" or a preference or prejudice "unjust" unless a finding of common control is made. Every one of the four elements which constitute an unreasonable discrimination must exist before the Commission is empowered to exercise its remedial authority.

Rather than authority for the Commission to ignore the need to find common control in finding undue discrimination, *New York* and *Ayrshire* are concerned with the power of the Commission to enforce a remedy *after* a proper finding of undue preference and prejudice. This is the fundamental distinction between these decisions and the decisions of *Central R.R.*, and *Texas & Pacific Ry., supra,* which demonstrate the meaning of undue preference and prejudice under the Act as applied to carriers. Not only is it clear these cases refer to the nature of a remedy, but the Court in both cases left intact and undisturbed the essential interpretation of former § 3(1) of the Act [now 49 U.S.C. § 10741] as determined in *Texas & Pacific Ry.*

Petitioners claim that because *New York, supra,* arose after the amendment to the Interstate Commerce Act which added ports and territories to § 3(1) of the Act, the fundamental meaning of undue preference and prejudice under the Act was altered. This is, of course, inaccurate. The Court in *New York* dealt with territorial discrimination arising as a result of rates which were found to be unreasonable and then enforced a remedy under § 15 [now 49 U.S.C. § 10704] to prescribe *reasonable* rates. The Court demonstrated the distinction between that power, in former § 15(1), and the necessity for a proper finding of preference or prejudice. The Court stated, at 331 U.S. at 341:

> "Section 15(1) provides that when the Commission finds that "any individual or joint rate, fare, or charge" of a common carrier is "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial," the Commission may determine and prescribe "what will be the just and reasonable" rate.

> And see § 15(3). The words "unjustly discriminatory or unduly preferential or prejudicial" plainly refer to practices condemned by § 3(1). *A proper finding of unlawful discrimination under § 3(1) thus enables* the Commission not only to direct the carriers to eliminate the practice but also, pursuant to § 15, to prescribe the alternative. (emphasis supplied)

The Commission's actual control test requires such a "proper finding" of undue discrimination in accord with the specific holding of *Texas & Pacific Ry., supra.* As the Court likewise stated in *Ayrshire Collieries v. United States,* 335 U.S. 573, 594 (1948):

> "As we noted above, the present proceeding was under § 15(1) and § 15(7). Section 15(1) gives the Commission power to determine and prescribe the just and reasonable rate *once it finds, inter alia,* that any rate charged is unjustly discriminatory or unduly preferential or prejudicial." (emphasis supplied)

In both *New York* and *Ayrshire Collieries,* the focus of the Commission's action was on the remedy to cure an unreasonable level of discriminatory rates. The level of unreasonableness of the reduced rates in this proceeding is not even at issue. On the fundamental meaning of undue preference and common control of rates, *New York* left *Texas & Pacific Ry.,* undisturbed. The Court specifically refused to rule on the question of control of rates, even on an interterriorial basis, because the *control* of rates under former § 3(1) [now 49 U.S.C. § 10741] was not in issue. *Texas & Pacific* was left unchallenged in *New York,* as the Court stated, 331 U.S. at 342:

> "For the principle announced in *Central R. Co. v. United States* and *Texas & Pacific R. Co. v. United*

> *States, supra,* is applicable only where the Commission is directing the carriers to remove the discrimination. *Those cases hold that the Commission may not require carriers to do what they are powerless to perform.*" (emphasis supplied)

Intervening Respondents submit that the foregoing discussion indicates there is no basis whatsoever for this Court to conclude that the Fifth Circuit's decision below is contrary in any respect to the decisions of this Court cited by Petitioner. The circular nature of Petitioner's reasoning is perhaps best illustrated by the following excerpt from Page 18 of the Petition:

> "*New York* and *Ayrshire* make it very plain the ICC is in error when it holds it cannot correct a discriminatory rate situation without finding common control by one or more carriers. It is even more in error when it says it cannot, or will not, strike down rates which are unjustly discriminatory unless it finds such rates also contravene some other prohibition of the Act."

In making the above argument, Petitioner has assumed, without admitting it, that a finding of common control is not a prerequisite to determining that a rate is discriminatory. Contrary to Petitioner's assertion, the ICC did not find the rate to be discriminatory and that result was based upon its finding that there was no showing of common control.

Failure To Agree On Divisions

Petitioner attacks the actual common control standard as unreasonable and impossible to apply, claiming that carriers will be able easily to evade a finding of common control by merely refusing to agree on division of the

proposed joint rates. However, the actual common control standard is supplemented by the Commission's "good faith offer of divisions" test which will negate any possibility of carrier abuse under the new standard. The Commission's decision has considered the needs and provided balanced protections for the ports and carriers alike.

Under the Commission's actual common control standard, the Commission has recognized the fact that a violation of § 10741 is not a matter to be assumed from a mere disparity in rates. Under such standard, if a destination or other connecting carrier refuses to participate in joint equalized rates, the origin and connecting carriers will not be considered as acting in concert, and the carrier who has initiated a single line rate change will be deemed not to control the rates to the differently treated ports.

The ICC's decision under appeal contains a rational discussion of Congressional policy under the Railroad Revitalization and Regulatory Reform Act of 1976 which mandates greater future ratemaking flexibility for railroads in competitive situations. (Pet. App. 107a) The "good faith offer of divisions" test comports with this policy since it recognizes that connecting carriers are under no definite obligation to agree to new reduced joint rates proposed by originating carriers. Contrary to the assertions of Petitioner, the "good faith offer of divisions" test gives any party claiming rate discrimination a definite formula for developing factual evidence bearing upon which railroads can "control" the rates complained of. No case cited by Petitioner gives any supportable basis for faulting the use of evidence regarding divisions as an indicator of common control in a rate discrimination case.

Scope Of Judicial Review

Petitioner claims that the ICC has made errors of law and has acted arbitrarily. This Court is well aware of the terms of Section 706 of the Administrative Procedure Act, which sets forth the criteria for judicial review of agency action. The Fifth Circuit was authorized to set aside the ICC's decisions only if it found them to be:

> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> "(B) contrary to constitutional right, power, privilege, or immunity;
>
> "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> "(D) without observance of procedure required by law;
>
> "(E) unsupported by substantial evidence . . ." U.S.C. Section 706 (1966).

The above standard of review was generally the law of the land even prior to adoption of the Administrative Procedure Act. *Manufacturers R. Co. v. United States*, 246 U.S. 457, 481, 62 L.Ed. 831 (1918).

It is generally accepted that a reviewing court will accord particular deference to an agency decision in the area of factual responsibility delegated to it by Congress. This Court has noted that ICC ratemaking is such an area of agency expertise, stating:

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent

> expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

Board of Trade of Kansas City v. United States, 314 U.S. 534, 546, 86 L.Ed. 432 (1942).

A landmark case ruling upon the scope of judicial review of ICC decisions is *The Atchison, Topeka and Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 809, 37 L.Ed.2d 350 (1973), where this Court concluded that:

> "It is enough to satisfy the requirements of judicial oversight of administrative action if the agency asserts distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing. So long as the policies can be discerned, the court may exercise its proper function of determining whether the agency's policies are consistent with congressional directives."

The above standard is the proper measure for reviewing the instant ICC's decisions. Applying said standard here shows that the ICC amply explained its basis for applying the "good faith offer of divisions" test to ascertain whether the Frisco had offered equivalent service at equivalent rates to Corpus Christi, thereby showing that it lacked common control of the rates to Corpus Christi. Likewise, under said standard of review, the vacation of the Corpus Christi rate equalization orders, and the cancellation of the presumption of railroad network control of rates was properly within the discretion of the ICC, and the ICC's action was rationally articulated as being within its Congressionally delegated authority.

Mootness

Petitioner, relying on the line of cases following *United States v. Munsingwear, Inc.*, 340 U.S. 360, 71 S.Ct. 104, 95 L.Ed. 36 (1950), alleges that the Fifth Circuit committed a procedural error by dismissing, instead of remanding to the ICC with directions to dismiss, Docket Numbers 78-1348, 79-1816, and 80-1842 (the *Wheat* cases). This complaint is apparently directed at the res judicata effect accorded the aforementioned docket numbers. As regards future rates to Corpus Christi, or any future claim of rate discrimination, any such future rate complaints will be litigated on a case by case basis. However, the underlying issue in the *Wheat* cases was the concept of common control which was finalized in the ICC's decision herein cancelling the *Corpus Christi* cases and is the primary subject of this appeal.

Petitioner admits that the ICC's decision cancelling the *Corpus Christi* cases (Pet. App. p. 92a) is not moot. Therein the ICC modified to a certain extent its decisions in the *Wheat* cases and reaffirmed its discussion therein of the actual control standard. (Pet. App. 107a, 108a) Accordingly, no legitimate purpose would have been served if the Fifth Circuit had, on grounds of mootness, required the ICC to dismiss the *Wheat* cases and thereby create doubt as to the significance of the ICC's references to the *Wheat* cases in its decision cancelling the *Corpus Christi* cases. There is no reversible procedural error on the mootness point which warrants review by this Court.

CONCLUSION

Petitioner has presented no supportable basis for granting the petition for a writ of certiorari. Petitioner's primary

objection is that the Fifth Circuit saw no error in the Interstate Commerce Commission's ruling that actual common control of rates is a prerequisite to proving rate discrimination under 49 U.S.C. § 10741(b) and that evidence regarding a "good faith offer of divisions" is one manner of illustrating actual common control. The Interstate Commerce Commission ruling on this point is in accordance with the law and it has presented a rational and articulate discussion of the basis for its ruling. Accordingly, there is no reversible error and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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